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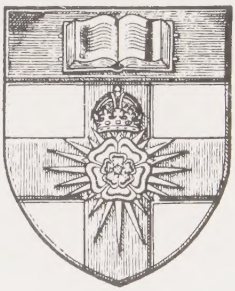

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THE

CRIMINAL APPEAL REPORTS.

WITH

SUBJECT INDEX, TABLES OF CASES AND STATUTES CITED.

EDITED BY

HERMAN COHEN,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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1909.

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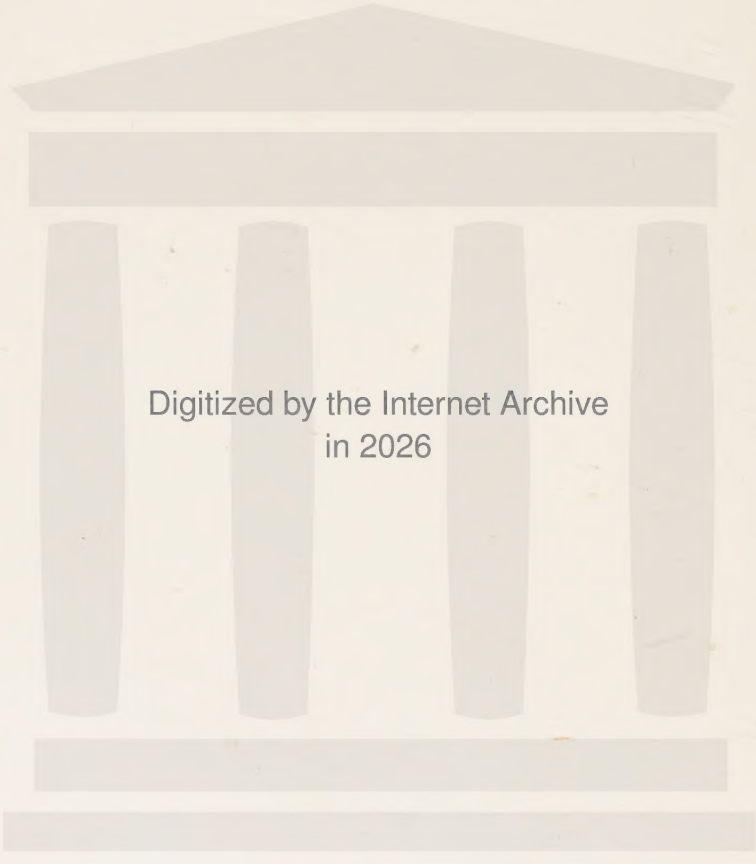
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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BIGHAM AND MR. JUSTICE WALTON.

DANIEL DONOVAN AND JAMES HURLEY.

1909
15 *January.*
Daniel Donovan and James Hurley.

Further evidence—Witness at the trial admitting perjury, on oath.

THIS was an application, referred to the full Court by Mr. Justice Darling, for leave to appeal (on facts) against conviction, and to call further evidence. Appeals on points of law were also in the "final" paper for the day. Appellants were convicted before Bucknill J. on December 15th, at Swansea Assizes, of manslaughter, and sentenced to ten years' penal servitude.

Barton for appellants (under sect. 10 of Criminal Appeal Act), who were not present. There had been a miscarriage of justice owing to the lack of trustworthy evidence. Perjured testimony had been given by a woman, Croley, who was a witness on behalf of the prosecution at the trial. The witness had admitted this on oath. The facts of the case made possible the theory that the woman, whose death appellants were convicted of causing, fell downstairs under the influence of drink. There was no evidence to shew that the deceased woman had been struck by anyone at all, but there was evidence to the effect that everybody on the premises at the time, including the deceased, the witnesses and appellants, were in varying conditions of intoxication.

The LORD CHIEF JUSTICE: The case requires further investigation, but the Court does not express any opinion with regard to the merits.

Leave to appeal and to call further evidence. Solicitor assigned. Appeal to be heard, with appeal upon questions of law, at the next sitting of the Court.

1909
15 *January.*

Harry Baker.

HARRY BAKER.

Frivolous appeals.

This was an appeal against the order of Darling J. refusing leave to appeal against conviction and sentence, and legal aid. Application was also made for leave to call further evidence.

Appellant, who had been convicted at North London Sessions on December 22nd of stealing a shawl, and sentenced by the Deputy-Chairman to eighteen months' hard labour, appeared in person.

The Lord Chief Justice: This is one of a class of cases to which the Court has had repeatedly to call attention. If these frivolous kinds of appeal continue it will be necessary to consider whether some step cannot be taken to prevent them. Such cases involve much unnecessary expense and preparation of documents. The appellant, who was convicted upon the clearest possible evidence, merely repeats what any man of his class would say in the circumstances. Appellant's record is extremely bad, and there is no ground whatever upon which any interference with the conviction or sentence can be made.

Applications refused.

George William McNair.

GEORGE WILLIAM McNAIR.

If a defendant reserves his defence before the magistrate, so that his defence at the trial has not been investigated, the Court will not review the case on that ground. Otherwise, perhaps, if he has so acted by legal advice.

A conviction will not be quashed because, in a conflict of testimony, the jury might have come to an opposite conclusion.

Corroboration under the Criminal Law Amendment Act, 1885.

The Court will take into account the fact that an appeal might have been heard in the vacation in fixing the date from which sentence is to run.

This was an appeal against conviction, leave having been granted by Mr. Justice Darling. Application was also made to call further evidence.

Appellant was convicted at Manchester Assizes before Mr. Commissioner Mellor, on December 9th, of an offence under sect. 5,

1909
15 *January.*

George William McNair.

sub-sect. 1 of the Criminal Law Amendment Act, 1885, and sentenced to nine months' imprisonment with hard labour.

J. M. St. John Yates for the appellant (under sect. 10 of the Criminal Appeal Act), who was present. Appellant was convicted of an offence on August 3rd against his sister-in-law, a girl under sixteen years of age. Appellant's wife had alleged that she was cognisant of and saw the offence committed, and the girl corroborated this, but it was not until two days later that a complaint had been made. They admitted that when their mother appeared at 9 a.m. on August 4th neither of them made any complaint to her. They asserted that they both entered appellant's house with him at 11.30 p.m. on August 3rd. The defence was an alibi, but this had not been raised until after committal, the defence having been reserved at the preliminary hearing.

At the trial appellant swore that in consequence of a quarrel with his wife's family he went to his mother's house and slept there on August 3rd, and this was corroborated by his mother and a brother. His next-door neighbour deposed that he was on his doorstep between 11 and 12 p.m. on August 3rd, and did not see appellant or his wife or his sister enter the house, but did see Mary Mullens go in at 11.45 p.m. She lodged there, and deposed that she went home at 11.45 p.m., that no one was there at all, and that she slept the night on the sofa where the offence was alleged to have been committed.

The first complaint was made to the mother by appellant's wife on the evening of August 4th. The girl was examined by a doctor, who found no trace of virginity. Appellant was arrested on the 6th, and when the warrant was read said, "Do they say I have been harbouring her?" and at the station, "Well, if she is only fifteen, she has been done before." Counsel submitted that there was no corroboration, and, if there was, the verdict was against the weight of the evidence. In summing up the learned Commissioner laid great stress on the fact that no defence had been disclosed at the Police Court, and this, no doubt, had weighed unduly with the jury.

Ray, for the Crown: As there was no defence at the Police Court, the police could not investigate appellant's story. In the

1909
15 *January.*
George William McNair.

conflict of evidence the jury, who knew the place and saw the witnesses, were in a better position to judge than the Court.

The Lord Chief Justice: This is an extraordinary case, but it falls within the rule which we have stated, that we are not here to re-try cases which have been heard by a jury. If a prisoner is ill-advised enough to say at the Police Court that he will reserve his defence, thereby making it impossible for his story to be investigated before trial, it is no ground upon which we can interfere with the verdict. For an innocent man, the sooner his defence is raised the better. A suggestion has been made that another woman was sleeping at the wife's mother's house on the night in question, but it is only necessary to refer to it to shew that if appellant's story had been told earlier, the solicitor for the prosecution would have had an opportunity to investigate it. It is said that the defence was reserved on the advice of solicitors; in this case it appears that appellant reserved his defence because on some previous occasion he had been acquitted. If we thought that appellant had really acted upon the advice of solicitors it would be another matter, but appellant has expressly stated that he knew what he was doing. The only defence possible in this case would have been that appellant thought the girl to be over the age of sixteen. This defence could not be raised, as—the girl being his sister-in-law—appellant knew her age perfectly well. An appeal cannot be allowed solely on the ground that the story is extraordinary. This case is one of oath against oath, and there is no middle course open, although it was suggested that the verdict was one which no twelve reasonable men could have found. As, owing to the vacation, the appeal could not be heard on the earliest possible date, sentence will run from that date (December 25th).

Appeal dismissed: sentence to run from the day upon which the appeal should have been heard.

AUSTEN REGINALD STANDING.

1909
15 *January.*
Austen Reginald Standing.

Sentence for obscene and defamatory libels—Previous good character. On appeals against sentence, counsel for the Crown must be heard.

This was an appeal against sentence, leave having been granted by the full Court on December 22nd, when appellant in person had appealed against the refusal of Darling J. to grant leave to appeal against sentence, and legal aid.

Appellant was indicted for libel before the Recorder at the Central Criminal Court on December 9th. He was found guilty and sentenced to fifteen months' imprisonment without hard labour.

It appeared that appellant pleaded guilty to an indictment for libel in four counts. One count was for obscene libel, and the other three were for defamatory libel. The prosecutrix was a young woman eighteen years old, who, as a maid-servant, met appellant, who was a groom, and became engaged to him. That was in October, 1908. Shortly afterwards the engagement was broken off, owing to a quarrel which arose between them, whereupon appellant, who had gone to Hastings, began to send a series of libellous and obscene post cards and letters addressed to the prosecutrix at her place of service.

Appellant, who appeared in person, expressed regret at what he had done, urging that his character, which was hitherto unimpeachable, might be taken into consideration.

Stanley R. Crawford, for the Crown, was called upon by the Court, on the ground that it is the duty of counsel for the Crown to call attention to anything affecting sentence. The committing magistrate and the Recorder had taken a serious view of the case. The libels covered a period of about a month.

The Lord Chief Justice: Appellant has pleaded guilty to a charge of sending obscene libels to a perfectly respectable girl, who is only eighteen years of age. The case is a serious one, and though appellant has expressed his regret and urged his good character upon us, we cannot say that the sentence of fifteen months without hard labour is too severe.

Appeal dismissed. Sentence to run from date of conviction.

1909
15 *January.*

A. Staub.

A. STAUB.

Sect. 2 and proviso of the Criminal Law Amendment Act, 1885 (48 & 49 *Vict.* c. 69)—*Corroboration.*

This was an appeal against conviction on points of law; also an appeal from an order of Mr. Justice Darling refusing leave to appeal upon fact.

Appellant was indicted under sect. 2 (2) of the Criminal Law Amendment Act, 1885, for procuring a girl to become a common prostitute. He was tried at the Old Bailey before the Common Serjeant on December 10th and 11th, found guilty, and sentenced to six months' imprisonment with hard labour, and recommended for deportation.

It appeared that the girl was brought over from France by a lady to perform the duties of a servant in a boarding-house which the lady kept at Richmond. The girl was nineteen years of age. A little while afterwards the girl left Richmond to seek a situation in London. She looked for work at a laundry, and there found another girl who directed her to a lodging-house in Compton Street, where she took up her abode on October 12th, 1908. She was in the habit of taking her meals at a restaurant close by, at which appellant was a waiter. It was not till Sunday, October 18th, that she first spoke to appellant, telling him that she was uncomfortable in her lodgings and asking him to help her to find others. On that night appellant and the girl, after looking for rooms, went to a house belonging to a friend of appellant's and spent the night together. The next day, October 19th, appellant took lodgings in Warren Street for himself and the girl, where they passed as man and wife.

Appellant had, up to this time, been in association with another girl, who was admittedly a common prostitute. He left this woman in order to consort with the French girl. On October 22nd the couple took rooms in Seymour Street, and then it was that appellant took her to Piccadilly and showed her where to walk. Apparently the girl earned six shillings only in this way, but that sum was given to appellant.

W. B Campbell, for appellant (under sect. 10 of the Criminal

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15 *January.*
A. Staub.

Appeal Act), who was present. The verdict was entirely unreasonable. It was clear that before the girl consorted with appellant she had determined to adopt the life of a prostitute. A man in the boarding-house at Richmond had promised to help the girl, and had called on her when she was in London, and, according to appellant's evidence, that man had promised to live with her and to give her two guineas a week. All appellant did was to take advantage of the mode of life which the girl had determined to adopt before he met her. Appellant might have been charged summarily with living upon the earnings of a prostitute, but there was no evidence to support the indictment. When the girl came to London she had only fifty francs in her possession, and it was probable that she intended to resort to the methods of livelihood which she ultimately adopted. Moreover, there was no corroboration as required by the sub-section. All the facts relied upon as corroboration are equally consistent with innocence and guilt, and therefore cannot be said to "corroborate" the evidence of the prosecutrix, who was the only witness who spoke to any act of procuration.

Travers Humphreys, for the Crown, was not called on.

The Lord Chief Justice: The girl was corroborated in her evidence not only in a material particular but in the material particular. It is clear that the offence can be committed, although the girl, who was induced to become a prostitute, was a girl of bad character. The distinction between sects. 1 and 2 of this Act must be noticed, and I hope that distinction will never be abolished. The offence referred to in sect. 2 (2) is not that of procuring a girl on one occasion, but of procuring or attempting to procure a girl to become a common prostitute. Although the girl was doubtless easily led away, there was no evidence that she had become a common prostitute before appellant met her.

The only other suggestion now made is that she was visited by another man, but there is no evidence to shew that she was willing to be visited by others. There is corroboration of the girl's evidence that appellant took her to Piccadilly and advised her to walk the streets, in the evidence of three witnesses, who proved that appellant gave up his situation about that time and boasted that he was now living with two women. That is the material point. We think there was ample corroboration, and are of the

1909
15 *January.*
A. Staub.

opinion that there is no evidence to shew that the girl was a common prostitute before October 18th, 1908.

Appeal dismissed. Sentence to run from December 25th, 1908 (a).

James Crossley.

JAMES CROSSLEY.

Arbitration under the Workmen's Compensation Act, 1906, is a "judicial proceeding," so that a false oath thereat is perjury at common law.

This was an appeal against conviction on a point of law. Appellant was indicted for perjury before Mr. Justice Channell at Liverpool Assizes on December 16th. He pleaded guilty and was sentenced to nine months' imprisonment in the second division.

It appeared that the perjury in respect of which the charge was made was committed at an arbitration before a County Court judge under sect 1 (3) of the Workmen's Compensation Act, 1906. At the trial it was contested on the prisoner's behalf that the arbitration was not a judicial proceeding, and that therefore the wilful and corrupt giving of false evidence therein was not perjury at common law.

T. E. Rushton, for appellant (under sect. 10 of the Criminal Appeal Act), who was present on bail.

Throughout the Workmen's Compensation Act, 1906, proceedings under it were referred to as an "arbitration," and an arbitration was not a judicial proceeding. The wilful and corrupt giving of false evidence at proceedings which were not judicial was not perjury. *See* Archbold, 23rd ed. p. 1043; Roscoe, 13th ed. p. 679 and p. 682; Russell on Crimes, 6th ed. pp. 297, 298. Also sect. 1 (3) of the Workmen's Compensation Act, 1906, and sects. 1, 2, 3 and 4 of the Second Schedule to that Act. Rules 2 (1), 27 and 81 of the Workmen's Compensation Rules, 1907, also apply. The Arbitration Act, 1889, did not apply to such a proceeding (see sect. 4 of the Second Schedule), and therefore sect. 22 of that Act did not apply. Reference was also made to sect. 79 of the County Courts Act, 1888.

(a) See p. 4, above.

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Gilbert Jordan, for the Crown: The County Court judge was a statutory judge to try matters in dispute if the parties failed to agree upon an arbitration. It was clear, from the Workmen's Compensation Act, its schedules and the rules made thereunder, that the arbitration was a judicial proceeding. See sect. 1 (3) of the Workmen's Compensation Act, 1906, Sched. 2 (2), (11), (12), also the following rules 27 (1) and 81. It is quite clear, although the word "arbitration" is used in the Act, that such arbitration is not to be confused with an arbitration under the Arbitration Act, 1889, as Sched. 2 (4) of the Workmen's Compensation Act, 1906, enacts that the Arbitration Act, 1889, shall not apply to any arbitration under the Workmen's Compensation Act, 1906. There was no agreement between the parties to go before the County Court judge as arbitrator. The respondent to the application was compelled to go before the County Court judge at the hearing, in order that the question of liability might be settled by the judge in accordance with the provisions of the Act. For a definition of the words "judicial proceeding," see Stephen's Digest of the Criminal Law, 5th ed. p. 107; see also *Tomlinson* (1866), L. R. 1 C. C. R. 49; 36 L. J. M. C. 41; 10 Cox C. C. 323; 15 W. R. 46; 15 L. T. 188; 12 Jur. N. S. 945. The proceedings before the County Court judge were therefore clearly judicial proceedings, and it follows from that that the prisoner had committed the crime of perjury. Even if the proceedings were not judicial proceedings, it is submitted the prisoner was guilty of a misdemeanour at common law, as it has been held that it is common law misdemeanour to take a false oath with fraudulent intent in a matter of public concern, and a prisoner might be convicted of such misdemeanour on an indictment for perjury, the words "and so the defendant did commit wilful and corrupt perjury" being rejected as surplusage. See *Chapman* (1849), 3 Cox C. C. 467; 2 C. & K. 846; 1 Den. C. C. 432; T. & M. 90; 18 L. J. M. C. 152; 13 Jur. 885; *Foster* (1821), R. & R. 459; *Hodgkiss* (1869), L. R. 1 C. C. R. 212; 11 Cox C. C. 365; 39 L. J. M. C. 14; 21 L. T. 564; 18 W. R. 150.

The Lord Chief Justice: We think the view taken by Mr. Justice Channell was correct. It is true that in the Workmen's Compensation Act there are expressions describing the proceedings under the Act as an arbitration and the judge as an arbitrator, and it is also true that sect. 22 of the Arbitration

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Act, 1889, does not apply, but one has to consider in what capacity the County Court judge acted in these proceedings. Sect. 1 (3) of the Workmen's Compensation Act, 1906, and sect. 1 (2) of the Second Schedule to the Act, make it clear that the parties only resort to the judge failing agreement. The judge is not chosen by the parties, but is a statutory judge to try the issue between them. Rule 27 prescribes that the procedure shall be the same as in a County Court. It is quite intelligible that under the Arbitration Act, the basis of which was agreement between the parties, it was thought necessary to insert a special statutory provision. That consideration has no application where the judge is appointed to settle disputes where the parties cannot agree. The consequences would be very serious if there were no means of punishing perjury committed in these proceedings. We think this was a judicial proceeding.

Appeal dismissed.

Frederick Whiteman

FREDERICK WHITEMAN.

Sentence—Mistake in fact by the judge as to prisoner's antecedents.

This was an appeal against sentence, leave having been granted by Mr. Justice Darling.

Appellant was indicted for stealing from the person, and was tried before the Deputy-Chairman at North London Sessions, on December 8th, 1908.

He was found guilty and sentenced to two years' imprisonment under the Borstal system.

E. Percival Clarke for appellant (under sect. 10 of the Criminal Appeal Act), who was present: A mistake appeared to have been made by the learned judge in taking the career of another boy-prisoner, tried with him but acquitted, for that of appellant. The other boy had a bad record, and had been committed because a member of his family asked that he should be sent away for a long time. Moreover, on December 8th there was no power to sentence to the Borstal system, but only to recommend it. The appellant's father and a detective were called and examined by

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the Lord Chief Justice. They gave him a fair character, and thought that he had been led away by the other boy.

Woodgate, for the Crown, was not called on.

The Lord Chief Justice: A mistake has been made in confusing the records of the two prisoners. A sentence of six months' hard labour to run from date of conviction must be substituted for that recorded.

Sentence reduced.

CORNELIUS O'CONNELL.

Cornelius O'Connell.

Where a wrong standard or principle is applied in sentence, the Court will revise sentence.

Provocation ought to be taken into account in sentence.

This was an appeal against sentence, leave having been granted by Darling J., and from an order of the same learned judge refusing leave to appeal against conviction, and legal aid.

Appellant was indicted for manslaughter before Bucknill J. at Swansea Assizes, on December 13th. He was found guilty and sentenced to ten years' penal servitude.

It appeared that appellant struck the deceased with his hand and felled him to the ground. Appellant had previously insulted deceased's wife by calling her foul names.

Griffith Jones for appellant (under sect. 10 of the Criminal Appeal Act), who was not present. There was no evidence that appellant used his clenched first. Appellant gave deceased a "clout" on the left ear and two kicks. Deceased died almost immediately he was struck. There were one or two external marks upon deceased, but his liver and kidneys were found to be congested, and examination of the skull shewed an effusion of blood covering the whole brain. This could not have been caused by a blow, but it might have been caused by a fall. It was proved that deceased had been a drunkard, which would tend to make the arteries very brittle. Appellant had a very good character, though at the time he was in drink. It was submitted that he acted under provocation, having been struck on the eye earlier in the day by deceased's father-in-law.

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Hill Kelly, for the Crown: The bill sent to the grand jury was one for murder, but, on the advice of the learned judge, they found manslaughter. Appellant had received a month's imprisonment for assaulting deceased's wife, a little while before the present charge. He had received no provocation whatever from the man he killed. As the latter fell, appellant kicked him in the back and kicked him again in the head when he lay senseless on the ground. His conduct to those who came to deceased's assistance was extremely violent.

The Lord Chief Justice: This is a grave and very difficult case. On the advice of the learned judge, a bill for manslaughter was returned instead of one for murder. Deceased was an alcoholic subject, although only thirty-six years of age. Appellant was under the influence of drink at the time, and in an excited condition after a fight with the deceased's father-in-law. There is no evidence of vindictive feeling, but appellant was no doubt smarting under a sense of indignation. The Court has to consider whether the wrong standard has been applied as to sentence, and in this case the sentence must be reduced to three years' penal servitude.

Sentence reduced.

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Samuel Dixon.

SAMUEL DIXON.

Severity of sentence.

This was an appeal against sentence, leave having been granted by Mr. Justice Darling; also an appeal from the order of the same learned judge refusing legal aid.

Appellant was convicted, before the Chairman at Middlesex Sessions, on July 6th, on his own confession, of receiving stolen horses, and sentenced at the following Sessions to two years' imprisonment with hard labour.

Appellant appeared in person.

B. A. Smith, for the Crown: The sentence was heavy, but in view of appellant's character it ought not to be reduced. He had been convicted in April, on his own confession, before the

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Deputy-Chairman of the same Sessions for horse-stealing in the previous February, and sentenced to three months' hard labour, on the footing of its being his first offence. But on his release in June, 1908, he was tried for this offence, committed in November, 1907 (but discovered subsequently to the former trial), and on his counsel's advice pleaded guilty.

BIGHAM, J.: We do not think the sentence ought to be altered. Originally it was supposed that the theft in February was appellant's first offence. It has since been ascertained that it was not his first offence, and we have reason to believe it was not his first offence by any means. The sentence was a heavy one, but not so heavy as to justify this Court in interfering.

Appeal dismissed.

WILLIAM JOHNSON.

William Johnson.

Reference by the Home Secretary.

"Incorrigible rogue"—Sects. 3, 4, 5 of Vagrancy Act, 1824.

It is a condition precedent of conviction under sect. 5 that the previous conviction as "a rogue and vagabond" therein referred to should be express.

Brown (1 Crim. App. R. 85), *followed—Sentence (but not conviction) quashed.*

This was a case referred to the Court by the Secretary of State under sect. 19 (a) of the Criminal Appeal Act, 1907.

Appellant was convicted of being an incorrigible rogue, and sent to Cheshire Quarter Sessions, where he, on October 28th, 1908, was sentenced to twelve months' hard labour.

It appeared that appellant was convicted on August 12th, 1905, of being an "idle and disorderly person" under sect. 3 of the Vagrancy Act, 1824 (5 Geo. IV. c. 83). He was again convicted at Altrincham on December 10th, 1907, of the same offence. On October 24th, 1908, he was convicted under sect. 5 at petty sessions of being an incorrigible rogue, "having been twice previously convicted of being an idle and disorderly person," and committed to prison to be sentenced at the next Cheshire Quarter Sessions.

Ralph Bankes for appellant (under sect. 10 of the Criminal

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Appeal Act), who was not present. The appeal was against the jurisdiction of Quarter Sessions to deal with the case. Sect. 5 of the Vagrancy Act, 1824, required that the person who was to be sentenced by Quarter Sessions as an "incorrigible rogue" must first (*inter alia*) have been convicted of being a rogue and a vagabond.

Appellant could have been convicted of being a rogue and a vagabond on December 10th, 1907, but on that occasion he was convicted of being "an idle and disorderly person" only. Appellant therefore had not been "at some former time adjudged so to be," viz., a rogue and vagabond, as required by sect. 5 of the Act, before Quarter Sessions could deal with the matter. If on December 10th, 1907, he had been convicted of being a rogue and vagabond under sect. 4, the conviction in this form might have been good, according to Oke's Magisterial Formulist, 8th ed. (1901), p. 335, "*Second Offence as a Rogue and Vagabond.*] . . . the said A. B. having been previously convicted of being a rogue and vagabond, *or* having been twice previously convicted of being an idle and disorderly person, *or* once previously convicted of being an idle and disorderly person, and afterwards convicted of being a rogue and vagabond." But if they desire to deal with him as a rogue and vagabond they must say so expressly. There is nothing to shew that the Altrincham bench knew of the previous conviction—which is the gist of the case. In order to make appellant an incorrigible rogue he must not only have committed offences which justified his conviction as a rogue and vagabond, but he must in fact have been so convicted. The same point arose in *Nash* (1883), Ludlow Quarter Sessions, "probably following" *Ex parte Eleanor Reed* (1858), 22 J. P. 271. (See Stone's Justices' Manual, 39th ed., 1098, n., and 1093, n. (*g*), whence it appears that *Ex parte Reed* is "set aside." See also *Ex parte Elizabeth Jones* (1852), 21 L. J. M. C. 116.)

[The Lord Chief Justice: The Master's book has been sent for from the Crown Office, and the minute there does not correspond with the report of *Reed*. Huddleston, Q.C., did not move for *certiorari* but for a writ of *habeas corpus*.]

Colt-Williams for the Crown: It is clear that it was intended to convict appellant of being a rogue and vagabond on December 10th, 1907, his career being known to the police. It

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was not necessary for that conviction to appear on the certificate of conviction.

The Lord Chief Justice: It is important that it should be understood under what power the Court is acting. In *Walter John Brown* (1908), 72 J. P. 427; 1 Crim. App. R. 85, we have decided that, under sect. 20 (2) of the Crim. App. Act, a person convicted at Petty Sessions of being an incorrigible rogue and referred to Quarter Sessions, has no right of appeal against the conviction, but only against the sentence. He can only raise a matter on the face of the record or the question of punishment, but not the merits of the conviction before the justices. But by sect. 19 of the Criminal Appeal Act it is stated that "the Secretary of State . . . may . . . refer the whole case to the Court of Criminal Appeal . . . as in the case of an appeal by a person convicted." The present case has been referred to us under that section. Appellant has raised a point to which we think effect must be given. The proceedings at Petty Sessions on October 24th, 1908, were based on the two previous convictions of being "an idle and disorderly person" of August 12th, 1905, and December 10th, 1907, respectively. But by sect. 5 of the Vagrancy Act, 1824, it is necessary that appellant should have been convicted of being a rogue and vagabond before he could be dealt with by Quarter Sessions as an incorrigible rogue. The third conviction shews on the face of it that the ground of jurisdiction was the previous conviction as idle and disorderly, *i.e.*, so found under sect. 3. I express no opinion what would have been the position if on the face of the Altrincham conviction it had appeared that that was after a previous conviction. Here there are only on the record two separate convictions as an idle and disorderly person. It is clear that to justify conviction as an incorrigible rogue under sect. 5 there must be evidence that appellant had been previously convicted as a rogue and vagabond, and as that evidence—a condition precedent—is not forthcoming, the order of Quarter Sessions must be quashed.

Sentence of Quarter Sessions quashed: Ordered that, as far as that sentence is concerned, appellant be discharged from custody.

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Charles Frederick St. Lawrence.

CHARLES FREDERICK ST. LAWRENCE.

Severity of sentence—Good character after a previous conviction.

This was an appeal from an order of Mr. Justice Bigham refusing leave to appeal against sentence.

Appellant pleaded guilty to forgery and false pretences before the Common Serjeant at the Central Criminal Court on November 12th, 1908, and was sentenced to three years' penal servitude.

Eustace Fulton for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. Appellant had represented himself as a traveller for well-known firms, and in that capacity had obtained small sums of money from retail traders. The money obtained was for goods supplied, and in some instances cash was given with new orders. The four indictments in which appellant was charged were in respect of three transactions, in which the amount of money obtained amounted to only £2 : 3*s.* 0*d.* Appellant had himself informed the police that he had obtained further sums to the amount of £10. There was a previous conviction for a similar offence, and the sentence passed in respect of that was only three months' imprisonment without hard labour. Evidence was called giving appellant two or three years' good character, and the police admitted that he had been employed by firms of good standing during that time, receiving a good character while so employed.

The Lord Chief Justice: Appellant pleaded guilty to the charges in these three transactions, and it appears that they were not the only occasions upon which he has practised these frauds. Those of us who have to try this kind of cases know what intolerable hardships are imposed upon small shopkeepers by this sort of deception. Appellant's good character had been given every consideration, and the sentence imposed was not too severe.

Application refused.

DANIEL DONOVAN AND JAMES HURLEY (*a*).

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Daniel Donovan and James Hurley.

Prisoners not called at the trial.

When there is a verdict of manslaughter on an indictment for murder the Court will not review the case merely because the defence did not address itself to the lesser charge.

Appellants visited a house in Cardiff which had the reputation of being one of the worst brothels in the place. They were at this house at 2 p.m. on the day that the offence was committed, and stayed there in company with a number of men and women. A good deal of drinking was indulged in during the afternoon, and the evidence went to shew that by the evening all the parties were in varying conditions of intoxication.

Later in the evening several couples went upstairs to the rooms above, a man and woman named Hayes and Croley occupying a room which opened on to the top of the staircase, which was extremely steep. Only appellants and the deceased woman remained downstairs. A woman named Kate Fury gave in evidence that she saw the deceased woman lying on her back on the floor of the kitchen, and the appellants standing by. She said to appellants, "What have you done to the woman? it is a shame." whereupon Hurley replied that if she did not stay where she was he would do the same to her. Appellants afterwards carried the deceased woman upstairs to a back bedroom and left her there in a dying condition. The medical evidence shewed that the deceased woman had received a star-shaped injury to the back of her head, which might have been caused by a fall.

Ivor Bowen for appellants (under sect. 10 of the Criminal Appeal Act), who were present. The whole of the evidence of the woman Kate Fury was untrustworthy, because on the night of the occurrence she was too intoxicated to recollect what actually happened. There was no blood found upon the floor downstairs, and though blood was found upon Hurley's clothes, this was accounted for by the fact that Hurley helped to carry the deceased woman upstairs. The defence was that the deceased woman went upstairs to quell a disturbance which had taken place there, and that she either fell, or was in some way thrown down the stairs. Appellants were not put into the box at the trial, because it was

(*a*) See p. 1, above.

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an indictment for murder, and the case as put by the prosecution was one of murder only; the question of manslaughter was first suggested by the learned judge during the summing up of counsel for the Crown. Then counsel for the prisoners addressed the jury. It could not be suggested that it became obligatory to call the prisoners to give evidence in every case of murder where manslaughter was raised. The case for the defence was put to the witnesses for the Crown in cross-examination. The prisoners were separately defended.

[The Lord Chief Justice: The rule as to the onus of proof is in no way altered by the Criminal Evidence Act, 1898.]

The evidence of one of the doctors was that he thought that the star-shaped injury to the skull had been caused by a fall downstairs.

Application was made to call the appellants and some of the persons ordered by the Court (*a*) to be present, but was refused.

Hill Kelly, for the Crown, was not called upon.

The Lord Chief Justice: We are of the opinion that the appeal cannot be allowed. It was perfectly well known to everyone concerned in the trial that it was open for the jury to convict of manslaughter. The suggestion is that the deceased woman met her death by falling downstairs; yet the appellants were never called to prove that they were merely spectators of this accident. Is there any reason why appellants should not have given this evidence? The learned judge who tried the case expressed himself as being perfectly satisfied with the verdict given, and if it is contended that the possibility of a verdict of manslaughter was not contemplated until the learned judge summed up, it is necessary to point out that the story of an accident would have been just as good a defence to murder as to manslaughter. The evidence of the woman Kate Fury cannot be disregarded; but if the story which we are now wished to believe is true, it was incumbent upon appellant to substantiate that story at the trial. Application has been made to call further evidence, but in this case it is impossible to allow an entirely different story from that presented at the trial to be set up in this Court.

Appeals dismissed.

(*a*) See p. 1, above.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CHANNELL AND MR. JUSTICE WALTON.

FRED DE VERE.

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Fred de Vere.

The defence of insanity ought to be raised at the trial—Sect. 5 (4) of the Criminal Appeal Act.

This was an appeal from an order of Mr. Justice Bigham refusing leave to appeal against convictions and sentences in respect of two indictments.

Appellant was convicted of larceny at the West Riding Quarter Sessions, before the Chairman, on January 4th, 1909, and sentenced to five years' penal servitude, and on January 7th, 1909, was convicted at the North Riding Sessions, before the Chairman, of a similar offence, and sentenced to the same term, the sentences to run concurrently.

Lionel P. Clay for appellant (under sect. 10 of the Criminal Appeal Act), who was not present. Appellant's state of mind was such that he ought to be dealt with as a criminal lunatic under sect. 5 (4) of the Criminal Appeal Act. He had been convicted many times since 1894, and sentenced to imprisonment and penal servitude; a large part of these terms he had spent in prison hospitals and in lunatic asylums; and in 1901 he was detained in Wakefield Asylum. The West Riding offence was committed only a fortnight after he came out of Wells Asylum. Three of his relations were similarly affected. His conduct after the North Riding theft was not that of a sane man; he went about wearing the jewellery which was the proceeds of his thefts. The evidence which the police inspector gave for the prosecution shewed that when appellant was in custody he was bordering upon a state of delirium tremens. His written statements also were so incoherent as to point to mental disturbance on his part.

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Fred de Vere.

The Lord Chief Justice: It is for the defence to prove insanity, not for the prosecution to prove sanity. There were two convictions against appellant, one of which was described as a heartless robbery—appellant having robbed his landlady of things which constituted all that she possessed, and during the last fifteen years he has been convicted of a number of serious offences, all under different names. At neither trial was the defence of insanity raised. We are urged to give effect to sect. 5 (4) of the Criminal Appeal Act, but in the interests of appellant himself we think that we should not interfere. His health will receive careful attention where he is.

Applications refused.

James Beauchamp.

JAMES BEAUCHAMP.

Defence of alibi *not set up at the trial must not be set up on appeal.*
If a witness for the Crown turns out to be an accomplice, the Court may review the evidence.

This was an appeal from an order of Mr. Justice Bigham refusing leave to appeal against conviction, and also an application to call further evidence.

Appellant was convicted of stealing and receiving at the Middlesex Sessions on January 11th, 1909, before the Chairman, was found guilty of receiving, and sentenced to three years penal servitude.

Sands for appellant (under sect. 10 of the Criminal Appeal Act), who was not present. Appellant was indicted with another man named Sink, against whom there were three distinct pieces of evidence, but as against appellant himself there was only one small piece of evidence, and that was not sufficient to support the conviction. Appellant had gone with Sink to sell a gun, which was stolen property, to a man named Goddard. Sink apparently did all the talking, and there was no evidence to shew that appellant had any knowledge that the gun was stolen, beyond the fact of his being with Sink. On the other hand, Sink went to Goddard two days later and received two shillings more in respect

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James Beauchamp.

of the gun. He also tried to sell him some other stolen property. The question arose whether the evidence of Goddard was the evidence of an accomplice, and whether the Chairman, in directing the jury, had called sufficient attention to the difference in the evidence against the two prisoners. Appellant did not go into the box, but an *alibi* was now one of the questions before the Court.

The Lord Chief Justice: Appellant cannot be allowed to set up a defence of *alibi* when at the trial he has not gone into the witness-box. With regard to the *alibi*, therefore, no leave can be given, but there may be a question as to the sufficiency of the direction in this case.

Leave to appeal (on point of law only) granted.

SAMUEL HARRIS.

Samuel Harris.

Reduction of sentence from imprisonment with hard labour to imprisonment in the second division.

This was an appeal from an order of Mr. Justice Bigham refusing leave to appeal against sentence, and bail.

Appellant was convicted on January 13th, 1909, under the Prevention of Corruption Act, 1906, at the Central Criminal Court, before the Common Serjeant, and sentenced to six months' hard labour.

Marshall Hall, K.C. (with him *Daniel Warde*), for the appellant, who was not present. Appellant had been found guilty of the offence of giving a cheque to a solicitor's clerk to induce him to do something against the interests of his employer. Appellant merely appealed for mercy. He was only thirty years of age, and, till this offence, of an unblemished character. There had been a certain amount of feeling in the case, and some hostility displayed against appellant, because while a summons issued was yet returnable, a warrant was taken out for his arrest on the ground that appellant was about to abscond. This was found

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to be quite untrue. It was possible to punish the offence committed in this case by a fine.

The Lord Chief Justice: The only point which we can entertain is whether appellant should be put in the second division. This is not a case for a fine.

Leave to appeal granted (as to sentence).

Solicitors for the Appellant: *Roberts & Co.*

Walter Pope.

WALTER POPE.

Conditions of identification—An alibi *will not be re-tried—If a statement by a co-prisoner not admissible against another does not in fact prejudice the latter, his conviction will not be quashed on account of it.*

This was an appeal from an order of Mr. Justice Bigham refusing leave to appeal against conviction, and bail.

Appellant was convicted of larceny at the Middlesex Quarter Sessions, before the Deputy-Chairman, on January 16th, 1909, and sentenced to twelve months' imprisonment with hard labour.

H. D. Roome for appellant (under sect 10 of the Criminal Appeal Act), who was not present. The identification was unsatisfactory. Three boys deposed to seeing a man whom they thought was appellant. The boys were in the police station when appellant was brought in and charged. One boy said he had seen appellant once before, the next boy said he could not identify him, and the third boy said that he knew appellant by sight. Moreover, appellant's friends said that at the time suggested he was with them at various public-houses. The man White, with whom appellant was indicted, had asked on the way to the station, "Has Pope been identified yet?" This statement was admitted, and must have prejudiced appellant's trial.

The Lord Chief Justice: This is an appeal upon fact, and if a question of law is now sought to be raised, extension of time must be obtained. With regard to the question of fact, the important point is that all three boys knew appellant before, and therefore it cannot be suggested that the identification is unsatis-

factory. With regard to the *alibi*, that question was tried, and we cannot re-try it here. The statement admitted was not used by the prosecution against appellant. It was admissible as against White, and at the trial the Chairman pointed out that it might incriminate others. Had it been used by the prosecution against appellant, the Chairman would have warned the jury with regard to it. Leave to extend the time cannot in this case be given.

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Walter Pope.

Applications refused.

HARFORD MOHR.

Harford Mohr.

Severity of Sentence.

This was an appeal against an order of Mr. Justice Bigham refusing leave to appeal against conviction and sentence, and bail.

Appellant was convicted at the North London Sessions, before the Deputy-Chairman, on the 7th January, 1909, of obtaining goods and money by false pretences, and, in three different cases, for obtaining credit by fraud, and sentenced to three and a half years' penal servitude, followed by three years' police supervision.

Walter Stewart for appellant (under sect. 10 of the Criminal Appeal Act), who was not present. With respect to the first count of the indictment, a cheque was given to a Mr. Ashton by appellant on 22nd July, 1908. At that time appellant's banking account would practically have met the order, which was for 2*l.* Mr. Ashton cashed the cheque, and endorsed it to some one else. Eventually the cheque, which was not presented till August 5th, came back marked R. D. Between July and August 5th appellant was given no notice that his account was overdrawn. On the 5th August appellant gave another cheque to Mr. Ashton, which he cashed, the first cheque not yet having been returned. It afterwards appeared by the books that on the 5th August appellant had no balance at the bank, and his account had not been touched since July. The Chairman referred to this second cheque as shewing a system; but as appellant did not know that his account was overdrawn, there was no possible nexus between the transaction of July and that of August. In any case the

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transaction of August was not admissible as evidence, being subsequent, not antecedent, in date to the cheque on which this charge was founded: *Francis* (1874), L. R. 2 C. C. R. 128; 43 L. J. M. C. 97; 12 Cox C. C. 612; 30 L. T. 503; 22 W. R 663, where see the judgment of Coleridge, L.C.J.; *Holt* (1860), Bell C. C. 280; 30 L. J. M. C. 11; 8 Cox C. C. 411; 6 Jur. N. S. 1121; 34 L. T. 310; 9 W. R. 74. It could be inferred from the evidence that appellant had a *bonâ fide* business. Counsel also referred to *Ollis*, (1900) 2 Q. B. 758; 69 L. J. Q. B. 918; 83 L. T. 251; 49 W. R. 76; 64 J. P. 518; 19 Cox C. C. 554, C. C. R.; also to the Lord Chief Justice's judgment in *Wyatt*, (1904) 1 K. B. 188; 73 L. J. K. B. 15; 52 W. R. 285; 68 J. P. 31; 20 T. L. R. 68; 20 Cox C. C. 462, C. C. R.

The Lord Chief Justice: There is a point in this case with regard to the sentence, and leave to appeal will be given as to sentence only. There is no ground for allowing leave to appeal against the conviction, as appellant undoubtedly carried out fraudulent transactions.

Leave to appeal against sentence granted.

JOHN PRESTON.

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1 & 2 *February.*
John Preston.

Sect. 1 (*f*) (*ii*) *of the Criminal Evidence Act*, 1898 (61 & 62 *Vict. c.* 36)—"*Imputations on the character of the . . . witnesses for the prosecution.*"

This was an appeal against conviction upon the Chairman's certificate granted at the trial.

Appellant was convicted of housebreaking before the Chairman at Worcestershire Quarter Sessions on January 4th, 1909, and sentenced to twelve months' hard labour.

A house in Birmingham was broken into at about 5 o'clock on the afternoon of the 2nd November, 1908. Information was given, and appellant was arrested. Appellant was placed with other men at the police station for the purpose of identification as a man seen in the neighbourhood on the day of the robbery. He stood second from one end of the row. He overheard the police inspector say something about "second" to a constable whom he sent to bring in a man who was to identify appellant. This man, when

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he came in, immediately picked out the man standing second from the other end of the row. In giving evidence at the trial, appellant alluded to what had happened, and accused the inspector of deliberately assisting the witness in his identification, whereupon he was cross-examined as to previous convictions on the ground that his evidence "involved imputations" upon the prosecution. The real evidence against appellant was the fact that several small articles, which were missed from the house, were found upon his person. These, however, were difficult to identify on account of their common character.

Harold Hardy for appellant (under sect. 10 of the Criminal Appeal Act), who was present. Sect. 1 (f) (ii) of the Criminal Evidence Act, 1898, governs this case. The cross-examination of appellant as to previous convictions ought not to have been permitted, because what appellant had said in chief was merely a narrative of what he had seen and heard, and the observations made were pertinent to his defence. There was no attempt on the part of appellant to go out of his way to attack the character of the inspector. Counsel referred to *Bridgwater* (1905, 1 K. B. 131; 21 T. L. R. 69; 74 L. J. K. B. 35; 20 Cox C. C. 737; 91 L. T. 838; 53 W. R. 415; 69 J. P. 26, C. C. R.); *Rouse* (1904, 1 K. B. 154; 73 L. J. K. B. 60; 20 Cox C. C. 592; 89 L. T. 677; 52 W. R. 236; 20 T. L. R. 68; 68 J. P. 14, C. C. R.); *Marshall* (1899, 63 J. P. 36).

Graham Milward for the Crown. The statement was an attack on the credit of the witness, and formed no part of the defence. There was no need for appellant to refer to the identification proceedings, as it had already come out that they had fallen through. The statement made came within sect. 1 (f) (ii) of the Criminal Evidence Act, 1898, for the "nature . . . of the defence" was a direct attack upon the inspector. Counsel referred to *Sheean* (1908, 24 T. L. R. 459; 72 J. P. 232).

CHANNELL J.: This is a case which is very near the line. The question of admissibility of the cross-examination of prisoner as to character is never an easy one to determine, but we think that the true principle is laid down by the Lord Chief Justice in *Bridgwater* (above). If the nature of the defence involves the suggestion that the case for the prosecution ought not to be believed because of the misconduct of one or more of their witnesses, apart from their evidence, then it is permissible to inquire into the previous history

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of the person making those suggestions. Appellant was not defended upon the grounds that the police inspector was untrustworthy. It is true that appellant in the course of his evidence referred to matters which, if true, amounted to a serious charge against the inspector. But the question of identification cannot be said to have been irrelevant to appellant's defence. It was natural that appellant should refer to it. We do not think that, because a prisoner, perhaps inconsiderately, but naturally, and with reference to his defence, makes a statement of this kind, the statute means that his career is to be exposed. The case is very close to the line, but we think that the evidence should not have been admitted; and though, as far as the section concerns the crime of rape, it may have to be considered in the future, we think this case is not within the section, and the appeal must therefore be allowed.

Conviction quashed.

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David Maxwell and Horace Clanchy.

DAVID MAXWELL AND HORACE CLANCHY.

Severity of sentences running consecutively—On an indictment for assaulting a police officer in the execution of his duty, the onus is on the defendant to prove that he did not know that the person assaulted was a police officer— Forbes and Webb (1865, 10 *Cox C. C.* 362) *followed.*

These were appeals against conviction on the certificates of the Chairman at the trial, and against sentence, by leave of Bigham J. Appellants were jointly convicted at the Worcestershire Quarter Sessions on January 6th of breaking and entering, and of assaulting a policeman in the execution of his duty, and sentenced by the Chairman to twelve months' imprisonment with hard labour for each offence, the sentences to run consecutively.

Graham Milward for the appellants (under sect. 10 of the Criminal Appeal Act), who were present. They pleaded guilty to breaking in, but denied that they knew the man with whom they were struggling was a constable. The latter was concealed in the room near to the door, and when Clanchy came in, sprang at him and hit him with his staff. A fight took place, and it was said that Maxwell struck the officer in the eye with a sharp instrument.

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[The LORD CHIEF JUSTICE: Your real point seems to be that these two sentences ought to run concurrently instead of consecutively. The experienced Chairman actually asked appellants whether they would like the other cases against them to be taken into account.]

No notice was given that their assailant was a constable. He exceeded his duty in not first calling on them to surrender. The additional twelve months, in the circumstances, was not warranted. Two years' imprisonment with hard labour was one of the severest sentences known to the law. It may have been a bad burglary, but it was not a grave assault.

Carmichael, for the Crown, was not called on.

The LORD CHIEF JUSTICE: In *Forbes and Webb* (1865, 10 Cox C. C. 362), Russell Gurney, Recorder of London, laid it down that knowledge that the person assaulted was a police officer was not necessary to sustain an indictment for assaulting a constable in the execution of his duty. That decision has never been doubted, and we throw no doubt on it. Here the jury have found that appellants did know that the man who challenged them was a constable. At any rate, it must be established that the person charged did not know. Otherwise, even if the constable announced that he was one, it would always be open for prisoner to say, "I don't believe it."

As to the sentence, even if the policeman's injuries were exaggerated, it is not too severe, as appellants had admitted breaking into several pavilions.

Appeal dismissed.

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Robert Neil Maxwell.

ROBERT NEIL MAXWELL.

Severity of sentence—For the purposes of sentence there may be a distinction between an actual receiver of stolen goods and one who, knowing them to be stolen, merely gets rid of them to screen the thief.

This was an appeal against conviction, leave having been granted by Bigham J. Appellant was convicted at the Worcestershire Quarter Sessions on January 6th of receiving stolen property, and sentenced by the Chairman to three months' imprisonment in the second division. He was a younger brother of one of the appellants in the case last reported, and the stolen property in question was part of that supposed to have been stolen by them.

Graham Milward for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. All the facts in this case occurred after the elder Maxwell was arrested. The trial was after the former's. The evidence against this appellant was based entirely on three old golf balls. One Chrimes deposed that George Maxwell, another brother, who had absconded, left a bag at his shop on the same day as, or the day after, his brother was arrested. In it were four golf balls and some clothes. R. N. Maxwell called the same day at the shop. Chrimes told him his brother had left a bag for him, and asked him to take it away, and he did. The clothes were not charged in the indictment. The identity of the balls was in question; it was never proved that these were stolen. It was proved that some of the same make as three of them were stolen from the pavilion in question in David Maxwell's case. Appellant was not in any way connected with golf links. The kind of ball when new, was, it was proved, used in thousands. The policeman, Bartlett, who arrested him, swore that appellant had stated to him that he tried to get rid of them because they were stolen; but this appellant denied in evidence. At the trial there was a very grave question as to the trustworthiness of this officer. He had, for instance, sworn that the golf "pro" identified the balls; but this was shown not to be the fact, and the Chairman severely rebuked the witness. At the police court appellant had admitted that he had reason to believe that the clothes (which, he said, he had burnt), but not the balls, had been stolen, as he had

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read something in a newspaper, and that he had sent the things by George to Chrimes's to get them out of the house and to shield his brother. He did not, however, go into the box at the police court, and when taxed in cross-examination with telling different tales as to the balls, he said: "Well, I was reserving it." There was, in effect, no evidence against him except his own statement that he knew the bag contained stolen property. He said he had picked up the balls near another golf club, which was quite likely, but admitted throwing them away when he feared that his brother would be charged.

[The LORD CHIEF JUSTICE: The first time he said that was at the trial at Quarter Sessions.]

He thinks he said so to Sergeant Bartlett, the unsatisfactory witness.

[CHANNELL J.: If you deal with things you know to be stolen to enable the thief to get off, this is technically receiving and also becoming an accessory after the fact.]

True, but then the offence is only technical.

[The LORD CHIEF JUSTICE: Appellant was twice asked to produce the newspaper report he referred to. There was no evidence of any such report.]

There was no evidence of the identity of any of the things, and even if they were stolen, is this a case of receiving? At the worst, appellant is screening his brother after arrest. In any case, the sentence ought to have been nominal. At the trial he appeared as a person of good character.

Carmichael, for the Crown, was not called on.

The LORD CHIEF JUSTICE: The jury were entitled to consider adversely to appellant his silence at the police court and the fact that he reserved his defence. As to his shielding his brother, that defence must be received with caution, because he may be shielding himself. He may have received these goods before his brother

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was charged. It was a case for a light sentence, and the sentence is light. Individual judges might possibly have inflicted a less severe sentence, or made further inquiry whether, in fact, he was shielding his brother. But it is not the function of this Court to gauge nicely the terms imposed by judges at the trial.

Appeal dismissed.

Ernest Lemuel Best.

ERNEST LEMUEL BEST.

A confession is not inadmissible merely because it is obtained by the questions of a constable arresting—Gavin (1885, 15 Cox C. C. 656) *criticised.*

This was an appeal against conviction. Appellant was convicted on January 5th, 1909, at Stafford Quarter Sessions before the Chairman, of larceny by a trick, and sentenced to twelve months' hard labour.

Appellant had taken five pounds in silver to a shop assistant and asked to have it changed into gold. The shop assistant, who was a girl, did as appellant requested, but when she handed it to him appellant declared she had given him only four pounds ten shillings, whereupon the girl gave him another half sovereign. There were other charges against appellant of a similar kind on various dates. Thirty-one pounds odd was found upon appellant, and, after he had been cautioned, he was asked by a police constable where he had obtained it. Appellant replied that he had got most of it by means of this trick. At the trial appellant was cross-examined as to this but denied it, whereupon the constable was called to contradict him.

Wyllie for appellant (under sect. 10 of the Criminal Appeal Act), who was not present. Once appellant was in custody, the police had no right to ask questions of him. The evidence given was wrongly admitted. Counsel referred to the judgment of A. L. Smith J. in *Gavin* (1885, 15 Cox C. C. 656).

H. G. Farrant, for the Crown, was not called on.

The Lord Chief Justice: We see no grounds for interfering in this case. It is impossible to say that the question asked invalidates the trial. It often happens that a prisoner has to give

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an explanation with regard to things found upon him. Evidence with respect to all the tricks carried out by appellant might have been given in evidence to negative any suggestion of mistake. As to the decision in *Gavin* (above), we think that the case, as reported, states the law too broadly, a view that is borne out by the note at the end of the report (*a*). Moreover, Day J. expressly dissented from it in *Brackenbury* (1893, 17 Cox C. C. 628).

Appeal dismissed.

MOSES DAVIES.

Moses Davies.

Sects. 2 (2) *and* 6 (5) *of the Probation of Offenders Act* (7 *Edw. VII. c.* 17)—*Recognizance containing a condition as to abstention from intoxicating liquor—Conviction before the passing of the Criminal Appeal Act—Sect.* 3 (c) *of that Act and Rule* 19 *under it.*

This was an appeal against sentence, on a point of law. Appellant was convicted at the Denbighshire Quarter Sessions, before the Chairman, on January 8th, 1909, of having broken the conditions of a recognizance by which he was bound, and sentenced to twelve months' hard labour.

Appellant was convicted of house-breaking and larceny in January, 1908, but was then bound over under sect. 2 (2) of the Probation of Offenders Act, 1907. In addition to the condition to be of good behaviour, three conditions were imposed upon him, the second of which forbade him to indulge in intoxicating liquors. In January, 1909, appellant was charged, under sect. 6 (5) of that Act, with having broken the conditions by which he was bound.

Artemus Jones for appellant (under sect. 10 of the Criminal Appeal Act), who was not present. The justices at Quarter Sessions, in January, 1908, had no power to impose the second condition, because by sect. 2 (2) of the Act, that condition can only be imposed where the offence charged is one of drunkenness or was an offence committed under the influence of drink. There was no suggestion that the offence had been of that sort. In January, 1909, the only real evidence against appellant was that he had been seen loitering about public-houses and drinking therein. This evidence, which should never have been admitted, because the

(*a*) See on this point 146 C. C. C. Sess. Pap. 712 (1907).

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condition concerning drink ought never to have been imposed, influenced the justices in giving the sentence which they did.

[The Lord Chief Justice: It is difficult to see how this appeal can be heard at all. Appellant was convicted before the Criminal Appeal Act came into operation, and the Act says that notice of appeal must be given within ten days of conviction.]

Rule 19 of the Criminal Appeal Rules makes the period of notice run from the date of sentence.

R. M. Montgomery, for the Crown. The point of law—that it was illegal to include the condition of abstaining from intoxicants—had not been brought to the attention of the justices at Quarter Sessions in January, 1909, and the Chairman would, no doubt, be anxious that it should receive a ruling.

The Lord Chief Justice: We have felt some difficulty as to whether we could rightly entertain this appeal at all, and we offer no opinion upon the question whether an appeal will lie against a sentence passed upon a conviction which took place before the passing of the Criminal Appeal Act. We have, however, in this case given leave to appeal under sect. 3 (c) of the Criminal Appeal Act. The terms of the recognizance were no doubt made known to appellant, but the Probation of Offenders Act only allows a condition to abstain from intoxicating liquor to be imposed, where the offence, in respect of which it is made, was one of drunkenness or one involving it. We therefore think that the second condition ought not to have been imposed. We do not express any opinion as to what would have been the result if there had been any good evidence that appellant had broken the other conditions. There is no doubt that the question of appellant's insobriety influenced the justices, and evidence as to his habits ought not to have been admitted. Appellant is still bound by the first and third conditions imposed.

Sentence quashed.

EDWARD ROBERT RENDLE.

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Edward Robert Rendle.

On a joint count in an indictment charging two prisoners with larceny, one may be convicted alone, whether or not the indictment was good against the other—Sects. 12, 16 *of the Married Women's Property Act,* 1882 (45 & 46 *Vict. c.* 75).

Misjoinder of a count for felony with one for misdemeanour, where prisoner is acquitted of the misdemeanour.

This was an appeal against conviction upon a certificate granted by the Chairman at the trial.

Appellant was convicted before the Chairman at the Devon Quarter Sessions on 6th January, 1909, for larceny, and sentenced to four months' imprisonment in the second division. Appellant, who was indicted with a woman named Kate Cole, had gone with her to help her dispose of some articles belonging to the latter's husband. The husband had gone to West Africa, and his wife went to live with appellant. She and appellant went together to Minehead, a letter having been sent to the husband to the effect that he might cease to send her weekly allowance. The husband came home on receipt of this letter and prosecuted her and appellant for stealing his goods. Pending the trial husband and wife became reconciled. Consequently, at the trial it was arranged, for the convenience of procedure, that she should plead not guilty, and that no evidence should be offered against her, and this was done. Appellant thereupon put in an affidavit by Mrs. Cole that she was then living with her husband, and to this she swore in the dock.

Clarke, for appellant, then moved to quash the whole indictment, but this was refused. Appellant then pleaded not guilty. The jury were then directed to find Mrs. Cole not guilty, and she was discharged.

Dummett, for the Crown, then opened the case against appellant on the first count, as a principal in the larceny, and abandoned the second count, for receiving, on which, ultimately, a formal verdict of not guilty was taken.

E. Percival Clarke for appellant (under sect. 10 of the Criminal Appeal Act), who was not present. The first count of the indictment charged appellant and Kate Cole jointly. Under sects. 12 and 16 of the Married Women's Property Act, 1882, the indictment failed as against Kate Cole, because at the time of the trial she was living with her husband again; in such a case sect. 12

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expressly forbids him to take any criminal proceeding against her. The indictment against her should have been quashed, and as it is impossible to quash part of a count and leave the other part, the count ought to be held bad as against appellant also, because they were jointly indicted. *Edmondes* (1895), 59 J. P. 776. There should have been a count charging larceny against appellant only.

[The Lord Chief Justice: The count says nothing about "jointly."]

[Channell J.: It does not appear on the face of the indictment that Kate Cole was the wife of the prosecutor.]

That was why, before plea pleaded at the trial, appellant put in an affidavit by her to the effect that she was prosecutor's wife, and at the time of trial living with him. See *Heane* (1864), 33 L. J. M. C. 115; 9 Cox C. C. 433; 4 B. & S. 947; 10 Jur. N. S. 724; 9 L. T. 719; 12 W. R. 417, Q. B. But even assuming the first count was good, the whole indictment should be quashed, because the second count charged appellant with "feloniously" receiving. Receiving, in the circumstances of this case, was not a felony. *Payne*, (1906) L. R. 1 K. B. 97; 75 L. J. K. B. 114; 94 L. T. 288; 54 W. R. 200; 70 J. P. 28; 21 Cox C. C. 121; 22 T. L. R. 126; C. C. R. Thus there was an indictment charging a felony and a misdemeanour together (*a*). A misdemeanour does not become a felony by being so described in the indictment. It is true that sect. 91 of the Larceny Act, 1861, made receiving a felony if the stealing amounted to larceny at common law or by that statute. It was submitted that in this case the original stealing did not fulfil those conditions.

[Walton J.: If a misdemeanour is charged as a felony, is it not an answer to shew that the offence charged is no felony? In this case, however, the point does not arise, for appellant was acquitted upon the count for receiving.]

There was misdirection in the summing up, as the jury were not told that there must be *animus furandi* in the prisoner.

(*a*) The point as to misjoinder is settled by *Ferguson* (1855), Dears. & P. C. C. 427: 24 L. J. M. C. 61; objection after verdict of guilty on one count only cannot be sustained.

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Edward Robert Rendle.

R. E. Dummett, for the Crown, was not called on.

The Lord Chief Justice: We do not see that there was any objection to proceeding against appellant on the first count. It is not a question of quashing, but of establishing by evidence that one party was guilty and the other not. The prosecution said that they offered no evidence against Mrs. Cole. The summing up was sufficient.

Appeal dismissed.

NATHANIEL NATHAN and EDWARD HARRIS.

Nathaniel Nathan and Edward Harris.

Fraudulent misstatements of fact may negative the defence of merely "puffing" the value.

The limits of "indefinite praise" of a thing sold.

These were appeals against conviction and sentence, on points of law.

Appellants were indicted before the Recorder at the Central Criminal Court on 15th and 16th January, 1909, for conspiring together to defraud and for obtaining money by false pretences. They were only found guilty of conspiring to defraud, Harris being sentenced to eighteen months' imprisonment with hard labour and Nathan to fifteen months'.

Appellants went about endeavouring to dispose of polished horns to small tradespeople. They would tell some story about having brought the horns from abroad at great expense as a present for someone from whom they had received benefits. The representation was that the person required was unable to be found, and that, rather than take back the horns and pay the duty, appellants would let the shopkeeper have the horns at prices ranging from £2 to £4. They represented that the horns were very rare and were taken from an animal rapidly becoming extinct and were worth much more, and that they had refused an offer of very much more, on the ground that the person offering was a Jew, and that they would have no dealings with Jews. The evidence for the prosecution was that a fair price would be 25*s.* to 30*s.*

Rawlinson, K.C. (with him *Martin O'Connor*), for Nathan, who was present. Evidence had been admitted at the trial which

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Nathaniel Nathan and Edward Harris.

was not admissible. An expert witness as to value, Mr. Gore (from whom a receipt for £2 : 7*s.* 6*d.* for a set of horns was found on one of appellants), was asked whether he had given evidence in a precisely similar case (127 C. C. C. Sessions Papers, 189) to the one tried, and the fact that the prisoner at that trial had been convicted on an identical charge with the present one came out. The representations used were not false pretences, but merely extravagant praise of the articles to be sold. It was submitted that the sentence on Nathan was excessive, as he had hitherto an unsullied record, and had merely been Harris's servant, and that only for three weeks.

Joyce Thomas for Harris, who was present. The conviction in the previous case did not affect Gore's credit, and was not admissible against appellant: it had prejudiced its trial. Prisoner would not have been allowed to give such evidence where the same representations had been made and there had been an acquittal. A comedy was acted in introducing the goods. An ample opportunity to inspect had been given in each case. *Caveat emptor.* Evidence had been called that the actual price obtained for the horns was approximately their right value. The representations were mere "puffing." See *Bryan* (1857), 26 L. J. M. C. 84; 3 Jur. N. S. 620; 5 W. R. 598; 7 Cox C. C. 312; Dears. & B. C. C. 265; and *Roebuck* (1855), Dears. & Bell C. C. 24; 25 L. J. M. C. 101; 6 Jur. N. S. 178; 1 L. T. 337; 8 W. R. 193; 8 Cox C. C. 262.

Leycester for the Crown. As regards the sentence, the Recorder took into consideration that the frauds practised extended over a long period of time.

Walton J.: We think the Recorder was right in admitting the evidence which he did. The terms used by appellants were more than "puffing"; in declaring that the horns were rare and from an animal which was rapidly becoming extinct they exceeded what is termed "indefinite praise," and stated what they knew to be false. The Recorder had, therefore, quite rightly allowed the case to go to the jury, and there can be no interference either with the convictions or sentences.

Appeals dismissed. Sentences to run from date of conviction.

Solicitor for appellant Nathan: *Blackwell.*

Solicitor for appellant Harris: *David A. Romain.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE WALTON AND MR. JUSTICE JELF.

ARTHUR CLIFTON GREY.

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Arthur Clifton Grey.

In the shorthand notes of the trial questions and answers must be numbered.

This was an appeal from an order of Mr. Justice Bigham refusing leave to appeal against conviction and sentence, and asking leave to call further witnesses.

Appellant was indicted at Leeds City Quarter Sessions on January 7th, 1909, before the Recorder, for stealing two bicycles from different owners on different occasions. There was also a count for receiving the same. He was found guilty, and sentenced to five years' penal servitude.

Rowan-Hamilton for appellant (under sect. 10 of the Criminal Appeal Act), who was not present, in referring to the evidence taken at the trial, had occasion to direct the Court's attention to certain questions and the answers thereto. It appeared that in the shorthand notes supplied to counsel the questions put to witnesses were not numbered.

The LORD CHIEF JUSTICE made a formal order that the questions and answers in the shorthand notes should in all cases be numbered.

Applications refused.

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Edwin Pepper.

EDWIN PEPPER.

When the defence is an alibi, *the jury are not bound to find according to the greater number of witnesses for or against it.*

This was an appeal from the refusal of the Lord Chief Justice to give leave to appeal against conviction, and an application for leave to call further evidence.

Appellant was convicted of stealing a pair of boots on the 8th January, 1909, before the Recorder at Norwich City Sessions on the 13th January, and sentenced to six months' imprisonment with hard labour.

Gerald Dodson for appellant (under sect. 10 of the Criminal Appeal Act), who was not present. The evidence for the prosecution was not strong, depending practically upon the testimony of one witness. Appellant's defence was an *alibi*, which at the trial was supported by two witnesses, and it was now desired to call a third to depose to the same facts.

Walton J.: It is true that the evidence of the prosecution rested upon one witness, but she was a girl who knew appellant, and saw him face to face through the shop window, from the front of which the boots were taken. She had every means of identifying him, and her evidence was completely satisfactory.

Applications refused.

Thomas Walter Davidson.

THOMAS WALTER DAVIDSON.

Whether imprisonment with hard labour can be inflicted for attempting to obtain money by false pretences, quære.

These were two appeals from orders of Mr. Justice Bigham refusing leave to appeal against two sentences, and legal aid.

Appellant was convicted on two indictments, the first being for obtaining money by false pretences, and the second for attempting to commit the same offence.

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—
Thomas Walter Davidson.

He was found guilty upon both indictments at Southampton Borough Quarter Sessions, before the Recorder, on January 14th, 1909, and sentenced to twelve months' imprisonment with hard labour on the first and three months' on the second, the sentences to run consecutively.

Appellant, who was not present, was not represented by counsel.

The Lord Chief Justice: There is no ground for appealing against the sentence on the first conviction, but with regard to the second sentence, there may be a question whether hard labour can be given for the offence charged in the second indictment, and therefore leave to appeal against the second sentence will be given.

Leave to appeal against (one) sentence granted.

HARFORD MOHR(a).

Harford Mohr.

Transactions of the same class extending over a long period may be part of the res gestae.

Walter Stewart for the appellant (under sect. 10 of the Criminal Appeal Act), who was present. Upon the question of sentence, the material consideration was the state of appellant's mind on July 22nd, 1908. The cheque given on that date was not presented until August 5th, and during that time appellant had received no notice from the bank as to the state of his account. There was no *nexus* between the giving of the cheque in July and the additional one given in August. The expression "lying dormant for two months," as used by the learned Deputy-Chairman, was objected to upon the ground that it might have been thought by the jury to apply to the two months before the 22nd July, whereas the bank book made it clear that such expression could only apply to the time between September and November.

Symmons, for the Crown, was not called on.

(a) See p. 23, above.

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Mohr.

The LORD CHIEF JUSTICE: The Court granted leave to appeal against sentence because it was thought that it might be shewn that there was not sufficient evidence to enable the jury to convict upon the first count of the indictment. There is no ground for saying that there was no evidence, or that the Deputy-Chairman withdrew that point from the jury. Appellant was charged with a number of offences committed between July and November, 1908. There were six counts in the indictment for obtaining credit by fraud and false pretences in addition to the charge of false pretences in the first count. Appellant, in his address to the jury at the trial, dealt with the various transactions, but he neglected altogether to deal with the first count. The Deputy-Chairman said in summing up, "When you come to consider the question of fraud, the all-important point for you is, what was in the man's mind at the time? . . . . must he or must he not have known the state of his account, which was lying dormant for a couple of months with no transactions either on the one side or the other, excepting these cheques which were either not sent to the bank, or sent to the bank and returned marked R.D." His counsel assumes that those words could only apply to the November and not the July transactions. But the jury asked to see the first count, and they were handed the indictment to read for themselves. It is said that there was no *nexus* between the earlier and later transactions, but this was a question for the jury. Transactions of the class to which reference has been made, which extend over a long period, may have a material relation to each other. We are now satisfied that leave to appeal ought not to have been granted.

Appeal dismissed.

James
Beauchamp.

JAMES BEAUCHAMP (*a*).

Insufficient caution as to accomplice's evidence—In the event of a discrepancy between the judge's notes and those of the shorthand reporter, the former will generally be preferred.

Sands for appellant (under sect. 10 of the Criminal Appeal Act), who was not present. The only evidence against Beauchamp was

(*a*) See p. 20, above.

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the fact that he came with Sink when the gun was sold to Goddard for 5*s*. Considering the price, Goddard must be held to be an accomplice, and his evidence, considering his record, regarded as most unsatisfactory. Counsel referred to *Stubbs* (1855), Dears. & P. C. C. 555; 25 L. J. M. C. 16; 1 Jur. N. S. 1115; 4 W. R. 85; 7 Cox C. C. 48; *Tate*, (1908) 2 K. B. 680; 77 L. J. K. B. 1043; 1 Cr. App. R. 39; 99 L. T. 620; 72 J. P. 391.

It appeared from the shorthand notes that in summing-up the learned Chairman had referred to facts as being in evidence which were not reported by the shorthand writer in the examination of the witnesses.

[Mr. Justice Jelf: It is not right that the shorthand reporter should omit anything from the witnesses' examinations. In the case of a discrepancy the Court will prefer the judge's note.

The Lord Chief Justice: That is the practice of the Court.]

Burnie for the Crown. The whole question was whether Goddard could be regarded as an accomplice or not. The price given for the gun was not unreasonable, for it was an old muzzle-loader, and worth very little; but the question of price was not material. Appellant came with Sink, and therefore was in constructive possession of the gun, and was therefore in recent possession of stolen property.

The Lord Chief Justice: The summing-up in this case did not sufficiently distinguish between appellant and Sink. There was a great deal more evidence against Sink than against appellant, and other stolen property had been found in his possession. We think that it was important that a distinction should have been made between the cases of the two men. As far as Goddard was concerned, it must not be supposed that appellant could not have been convicted on the evidence of an accomplice. The Court dealt with that matter in *Tate* (above). There was not sufficient caution given as to Goddard's evidence. If the question of price at which the gun was sold is not to be considered, as the prosecution now admits, there was practically no evidence against Beauchamp.

Conviction quashed.

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James Lawrence.

JAMES LAWRENCE.

Misleading and ambiguous statements in a circular sufficient to constitute false pretences (a).

This was an appeal against conviction on a point of law. Appellant was convicted before the Recorder at Exeter Quarter Sessions, of obtaining money by false pretences, on January 5th, 1909, and sentenced to fifteen months' imprisonment in the second division.

The false pretences alleged were contained in a circular and a post-card. The circular (to which was attached a slip of paper containing the signature of the recipient) was headed "Phonic Musical Warehouse, High Street, Bexley, Kent," with a reference to a bank and a picture of a phonograph. It began, "We have attached your signature above, and you little thought when you wrote it that it would bring you this good news." There was no evidence how the signatures were obtained, but there was little doubt that they were taken from waste paper bought from newspapers holding competitions and from others, and also from allied companies carrying on a similar system. The circular proceeded to praise the merits of "instruments that will produce songs, band parts, speeches, and comic songs," and continued, "Many people, of course, have no other music in their house but a piano, and it is to these people, amongst others, we are now endeavouring to appeal by bringing to their notice the existence of a machine which reproduces the most exquisite music with the least possible trouble. Now your name has been selected by us as a possible agent for our musical instruments and other goods, and to represent us in your district, if you choose, and in consequence we have elected you to receive a 'Quintuple Phonic,' which is a splendid piece of work, and we are the sole owners of the copyright; no else can sell it. It is our desire to have our 'Quintuple Phonic' in every town and district in the United Kingdom, and we think that by this means we can advertise the machine as illustrated above, and at the same time save ourselves thousands of pounds which would otherwise be spent in newspaper advertising. We do

(a) Cf. *Paynter*, 1 Cr. App. R. 253.

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not ask you to do anything else for us in return, except to let your friends listen to the lovely music, and recommend our goods. Now you know why we have chosen you as a desirable person to represent us, and we will forward it on to you on receipt of a postal order for 2*s.* 4*d.*, an inclusive charge for carriage, cost and expenses. This offer is only open for twelve days. Remember, there is no further charge." A printed form sent with the circular was headed "Description of Prize Machine," and continued, "We can hardly expect you to recommend our goods without being rewarded in return, and we are therefore giving away a machine to anyone who does us most good in this way during the ensuing year. . . . . It is worth 10*l.* : 10*s.* 0*d.*, and should you be so fortunate as to take advantage of this offer and receive the machine as a prize, and become tired of it after you have used it for thirty-six days, and would like to have the money instead of the prize, we will send you 10*l.* : 10*s.* 0*d.* in gold in exchange for it." On sending 2*s.* 4*d.* a customer received a post-card acknowledging receipt "in full payment for Quintuple Phonic," and asking whether the customer would like to have a few more tunes to go with it, and continuing, "When entertaining your friends with the 'Quintuple Phonic' we think it would be very nice to have the six beautiful tunes as described above to play to them also, and we will send them off to you on receipt of postal order for 1*s.* 11*d.*" Expedition was requested, as "by doing this you will greatly help us in the task of packing and despatching the goods." In fact, the "Quintuple Phonic" turned out to be a sheet of music of five melodies, with a picture of a phonograph on the back.

F. E. Smith, K.C. (with him *Huntley Jenkins*) for appellant, who was not present. The indictment alleged several false pretences, some of which were withdrawn from the jury by the Recorder. All the false pretences relied upon by the prosecution were contained in the circular and the post-card issued by appellant. The prosecution alleged—

(1) That there was a false pretence that appellant was carrying on a genuine business as a musical instrument dealer at the address given in the circular and the post-card.

(2) That there was a false pretence that the Quintuple Phonic was a musical instrument.

With regard to the first allegation the evidence for the prosecution was not strong, and with regard to the second the repre-

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sentations referred to the future, in which case there could be no false pretence. *Lee* (1863), L. & C. 309; 84 L. T. 437; 11 W. R. 761; 9 Cox C. C. 304.

It was not a reasonable construction of the circular to suppose that it referred to a machine, because it contained the expression "we are the sole owners of the copyright," and the word copyright could not refer to a machine.

[The LORD CHIEF JUSTICE: What do you suppose the people who got this circular understood it to mean?]

The second document referred to a "prize machine," so that a distinction had to be drawn between that and the "Quintuple Phonic" referred to in the first circular.

Randolph, for the Crown, was not called on.

WALTON J.: The appeal must be dismissed. The simple reason is, that there was abundant evidence to go the jury to prove the false pretences laid in the indictment.

Appeal dismissed. Sentence to run from day when case first appeared in list.

Solicitor for the appellant:—*Arthur Newton.*

Robert Newson.

ROBERT NEWSON.

The Court will not quash a conviction merely because the evidence is circumstantial.

This was an appeal against conviction on a point of law. Appellant was convicted of breaking and entering and stealing 60*l*, also of receiving, before the Chairman at the East Suffolk Quarter Sessions, on the 8th January, 1909, and sentenced to four months' imprisonment with hard labour.

E. E. Wild for the appellant, who was on bail. There was no evidence to support the conviction. The prosecutor, who was an old man named Cowling, living at Stradbroke, resided alone two miles from Stradbroke Street. On the 5th December, 1908, on his return home at 8 p.m., he found that a box, in which he

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kept his savings, had been broken open and the money taken away. Appellant had lived near the prosecutor some fourteen years ago, but at the time of the robbery he was a small farmer and dealer, cultivating some six to seven acres at a place two miles from the prosecutor's cottage. It was proved by the prosecution that on the 5th December appellant was being pressed by creditors. On the 6th and 7th December, appellant was found to be paying bills with sovereigns, ten of which were of ancient date and of a dull appearance. With these ten coins he paid one particular creditor. Appellant could account for the money by his balance sheet, which showed payments to credit, while the old sovereigns were accounted for by a loan made to appellant by his wife, who had inherited a small hoard of gold. Some six days after the theft, a hook was found upon appellant's person; but he accounted for this by saying that he picked it off a manure heap, and it appeared that he had in fact been lately carting manure. At 6.30 p.m. on the night of the robbery, appellant was seen in Stradbroke Street presenting a normal appearance. Furthermore, the fact that he was a dealer easily accounted for the uncertain state of his finances, which, coupled with the fact that appellant bore an unblemished character, was a satisfactory answer to the charge, which at the most was only a case of suspicion.

Walter Stewart, for the Crown: The marks upon the box coincided with the shape of the hook The prosecution relied upon the date and colour of the coins.

The Lord Chief Justice: This case is near the line. Mr. Wild, in order to succeed, must satisfy us that there was no evidence for the jury. If there was, the case having been properly left to the jury, it was for them to decide. The Criminal Appeal Act has in no way altered the obligation which rests upon the prosecution to prove the case. The prosecutor lived alone, and there was evidence that appellant might know of his hoardings, some part of which had been in prosecutor's house for many years. On 8th December appellant paid a witness named Cole 10*l.* in sovereigns. Cole put them aside, having noticed the dates and the tarnished appearance of the coins. The dates upon eight of them ranged from 1851 to 1884, two bearing the later dates of 1891 and 1900 respectively. The hook found in appellant's pocket was an instrument which would open the box, and there were corresponding

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marks upon the box which the jury saw. It is evident, too, that for weeks back appellant had been in financial difficulties. He prepared a balance sheet, according to which in November he had 28*l.* or 30*l.* in hand. If that were so he might have then paid his creditors. But it was not until the 5th, 7th and 8th of December that he began to settle his liabilities. A significant fact in the case for the defence was that appellant's wife, who had a small saving, consisting of old coins, had given them to her husband two days after the robbery. The jury must be taken to have disbelieved this. It is impossible to say there was no evidence against appellant, nor was there any miscarriage of justice.

Appeal dismissed.

Solicitor for the appellant: *William Marshall, Ipswich.*

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE WALTON AND MR. JUSTICE PICKFORD.

THOMAS MEADE.

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Misdirection—Point of law emerging on application as to conviction—Amendment of notice of appeal allowed.

This was an application for leave to appeal against conviction.

Appellant was convicted of murder before Mr. Justice Coleridge, at Leeds Assizes, on February 10, 1909, and sentenced to death.

Willoughby Jardine for appellant (under sect. 10 of the Criminal Appeal Act), who was not present. Appellant was convicted of the murder of a woman named Clara Howell, with whom he had lived for the past seven years. On the night in question he and the woman had been to a friend's house, and when they left they were both drunk. During the early part of the next morning they were heard to be quarrelling, and later in that day, which was a Sunday, appellant went about saying, "I have killed Clara." During the day the house was visited and the dead body of Clara Howell was found. It was found to be covered with bruises, and a newly-broken broomstick was found in the room upon which were found traces of blood and hair. According to the medical evidence, death was due to a rupture of an intestine. Part of the quarrel on the early Sunday morning was overheard by a woman next door, who said that she heard appellant threaten to strike the woman where in fact she was found to have been struck. Later in the day appellant was able to give an account of what happened during the night, and he admitted that he gave the woman a blow in that part of the body. The quarrel appeared to have arisen over the ownership of a two-shilling piece. In summing-up, the learned judge had told the jury that unless they thought that appellant's "reason" had been "dethroned" by drink, so that he was incapable of forming a malicious intent, they must return a verdict of guilty. By a continual use of the expression "reason dethroned by drink," the jury were led to believe

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that appellant could not be excused unless he was mad with drink at the time. It was too strong an expression, for there might be a less degree of mental derangement which would reduce murder to manslaughter.

[Darling J.: That is only a modern doctrine.]

The doctrine was first mooted by Holroyd J. in *Grindley* (1819, 1 Russ. Cri. 6th ed. 143, *n.*), and is now settled law.

[Darling J. referred to Mr. Justice Stephen's judgment in *Doherty* (1887), 16 Cox C. C. 306.]

Counsel, continuing, submitted that the jury had to find that appellant not only could, but also did, intend to injure, and that the phrase used by the learned judge at the trial amounted to a misdirection.

Darling J.: This application raises no point of law, it raises a question of fact. It is suggested that the woman died from rupture, not from a blow, but from jumping out of a window. It is submitted that there was a misdirection with regard to the question of drunkenness, which is a point of law. Leave, however, is given to amend the notice of appeal so that the point of law, as to whether the direction was right, may be argued. The real question which the Court desires to be discussed is the true relation between *mens rea* and insanity (*a*).

Application dismissed; notice of appeal amended.

John Keating.

JOHN KEATING.

Identification by the voice.

This was an appeal from an order of the Lord Chief Justice refusing leave to appeal against conviction.

Appellant was convicted before the Deputy-Chairman, at Liverpool Quarter Sessions, on the 19th January, 1909, of burglariously entering a dwelling-house with intent to commit a felony, and sentenced to three years' penal servitude.

(*a*) See p. 54, below.

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Darby for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. The defence was not left to the jury at all. The Deputy-Chairman dealt with the question of intent, but neglected to tell the jury to consider the point raised as to identity, which was, in fact, appellant's real defence. A woman was sitting in the house into which entrance was made, but the only evidence of identification which she gave was as to hearing a voice, which she declared to be appellant's: he had no roof to his mouth. Evidence was given as to a scuffle having taken place, in which a stepson of the prosecutor, who was armed with a poker, lost two teeth, but no marks of violence were found upon appellant.

Leave to appeal granted.

EDWARD HAYES.

Edward Hayes.

Verdict alleged to be against the weight of evidence.

This was an appeal from an order of the Lord Chief Justice refusing leave to appeal against conviction.

Appellant was convicted of robbery with violence before the Recorder, at Manchester Quarter Sessions, on 30th Jan. 1909, and sentenced to twelve months' imprisonment with hard labour.

Bigham for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. Appellant was charged with three other prisoners. Prosecutor said that on Christmas Eve he went out with six years' savings in his pocket, amounting to £21. He was drinking at public-houses till 11 p.m., when he went home with a woman. Whilst in the house a dispute arose between him and appellant about half-a-crown. He was then hustled into a passage by appellant and another man and robbed. He went outside and fetched a constable, who returned with him to the house, when they found the four prisoners all together drinking tea. Prosecutor thereupon offered to square the whole matter for 5*s.* Evidence was given at the trial to shew that it was improbable that prosecutor ever had as much as £21 on him, and, though he stated that his father could explain the matter, the father was not called. At the police station prosecutor was found to have 6*s.* 11*d.* on him. None of the money was found in the house, or upon the persons arrested. The story told by the prosecutor was a most improbable one, especially having regard to

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the fact that at the time he was under the influence of drink. The story of the dispute in the house might have been true, without any robbery having occurred.

Darling J.: Leave to appeal must be given, on the hearing of which appellant is entitled to be present.

Leave to appeal granted.

Samuel Harris.

SAMUEL HARRIS (*a*).

Imprisonment "in the second division" for offences under the Prevention of Corruption Act, 1906 (6 *Edw.* 7, c. 34).

Marshall Hall, K.C., and *Daniel Warde* for appellant, who was present. The offence committed, namely, giving 5*l.* to a solicitor's clerk to induce him to represent appellant as insolvent, was one which might, but for the warrant obtained on a misunderstanding, have been dealt with summarily, in which case the maximum punishment was four months' imprisonment with hard labour, plus a fine of £50. Appellant had hitherto an unblemished character, and imprisonment in the second division was craved in substitution for the hard labour imposed.

Travers Humphreys, for the Crown, was not called on.

Darling J.: Appellant was convicted under a statute (6 Edw. 7, c. 34, the Prevention of Corruption Act, 1906) which aims at suppressing the very kind of offence which in fact was committed. Appellant endeavoured to avoid payment by bribing a solicitor's clerk to represent that he was insolvent. The question as to whether a convicted person should be sent into the second division or not depends upon the kind of person so convicted, and not upon the class of offence committed. Appellant has shown himself to be no better than a common swindler. In respect of the delay in hearing the appeal, there would be an allowance.

Appeal dismissed; sentence to run from date of conviction.

Solicitors for appellant: *Roberts & Co.*

(*a*) See p. 21, above.

THOMAS WALTER DAVIDSON (a).

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If, on a plea of guilty, an illegal sentence is passed, this Court can quash it, but cannot substitute another for it: sed quære.

Sect. 4 (3) *of the Criminal Appeal Act*, 1907, "*Sentence warranted in law by the verdict.*"

W. E. Lloyd for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. Appellant pleaded guilty to a second indictment for having attempted to obtain money and goods by false pretences, and was sentenced to three months' imprisonment with hard labour. In view of the fact that the offence charged in the second indictment was only a common law misdemeanour, the Court had no power to pass a sentence including hard labour. The Court of Criminal Appeal has no power to pass a sentence in substitution for one given improperly at the trial, unless such substituted sentence is warranted in law by "the verdict": sect. 4 (3) of the Criminal Appeal Act. There was no verdict, because there was a plea of guilty, and therefore no sentence in substitution can be passed.

W. D. Mathias for the Crown. The original sentence cannot be supported in its entirety, but by sect. 20 (2) of the Criminal Appeal Act incorrigible rogues, who are merely sentenced at Quarter Sessions, can appeal against the sentences so received. In those cases there was no verdict, and therefore in the present one, a sentence in substitution for the original can be given, although there was no verdict returned at the trial.

DARLING J.: It is clear that the sentence given in respect of the second indictment cannot stand. [The learned judge read sect. 4 (3) of the Criminal Appeal Act.] It has been pointed out that at the trial, seeing that appellant pleaded guilty to the second indictment, there was no trial upon that indictment, and no verdict. Words enabling an amendment of sentence might be read into the section, but they are not there, and this Court has no power to alter the Act in any way. It has no power to substitute any sentence for that given at the trial, for there is no *verdict* to warrant such sentence in law. As to incorrigible

(a) See p. 38, above.

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rogues, there was a special enactment in sect. 20 (2); there was none as to a plea of guilty. The Court is aware that the result may appear absurd, but there is no alternative (*b*).

Sentence quashed.

Nathan Gordon.

NATHAN GORDON.

The doctrine of recent possession applies to an agent with guilty knowledge.

This was an appeal against conviction, leave having been granted by the Lord Chief Justice.

Appellant was convicted before the Recorder at Manchester City Sessions, on January 27th, 1909, of stealing and receiving, found guilty, and sentenced to two months' imprisonment with hard labour.

H. S. Q. Henriques for appellant (under sect. 10 of the Criminal Appeal Act), who was not present. On January 5th, 1909, a handcart, containing some bales of goods, was stolen. A man named Burns was stopped the next day, wheeling a bale on a barrow. The bale appeared to be one of the stolen bales, and Burns, being asked, said that he got it at Gordon's. The police inspector who had stopped him, went to Gordon's shop and saw appellant, who was Gordon's son. Appellant told the inspector that he received the parcel the day before from a man named Brown, who lived in a tenement close by. The same man brought some more goods later on, and asked appellant to ask his father, the elder Gordon, how much he would give for them. Appellant was only agent for his father, and the doctrine of recent possession did not apply. Counsel referred to *Crowhurst* (1844), 1 C. & K. 370.

Pope, for the Crown, was not called on.

Pickford J.: It is not for us to say whether the case was a strong one against appellant. There was evidence upon which the jury could say that appellant received the property knowing it to have been stolen. He may only have been a servant of his father, but if he knew the things were stolen, he is guilty himself. They were in his possession. The only explanation he gave was that he received them from a man named Brown, and no such person could

(*b*) See, however, *Nuttall*, 1 Cr. App. R. 180 (1908), and *Ettridge* and *Woodman*, 2 Cr. App. R. (below).

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be found. Appellant's recent possession was not explained to the satisfaction of the jury. It is said that the jury were misdirected, but the Recorder told them that the receiving must be with a guilty knowledge. We think there was no misdirection, and that there was evidence to go to the jury.

Appeal dismissed.

HENRY BICKLEY.

Henry Bickley.

The evidence of a police spy or "agent provocateur" is not that of an accomplice and does not require corroboration.

Meaning of "noxious thing" within sect. 59 of 24 & 25 Vict. c. 100.

This was an appeal on a point of law against conviction, and an application for leave to appeal against conviction on fact and against sentence.

Appellant was convicted, under 24 & 25 Vict. c. 100, s. 59, before Mr. Justice Darling, at Leicestershire Assizes, after a trial, on January 26th and 27th, 1907, of having unlawfully supplied a noxious thing to a woman with intent to procure miscarriage, and sentenced to five years' penal servitude.

Powers for appellant (under sect. 10 of the Criminal Appeal Act), who was not present. First, there had been a misdirection inasmuch as no warning had been given to the jury that they should regard the evidence of the woman, to whom the drugs were supplied, as that of an accomplice. The woman, who was not pregnant, had been acting under police instructions in order to trap appellant. She ought to be regarded at least with as much suspicion as an accomplice. (*Connor* v. *People*, 36 Am. State Rep. at 300—1.) [Darling J. referred to *Mullins* (1848), 3 Cox C. C. 526.] That case is distinguishable, for there the offence, the conspiracy, had been already committed independently of the government spy; while here it is the police agent who herself suggested, instigated and created the offence. Secondly, the drugs given, being only ordinary purgative pills, did not amount to "a noxious thing" within the section. *Blakeman* (1873), 12 Cox C. C. 463, C. C. R. He referred to Baron Bramwell's judgment at p. 467.

Disney, for the Crown, was not called on.

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WALTON J.: In the first place, the fact that the woman was a police spy in no way invalidates her evidence, nor must her evidence be regarded as that of an accomplice. As the law stands at present, it seems established that a police spy does not need corroboration. *Mullins* (above). The American case quoted has no bearing upon the question at all, and the Court's remarks there were *obiter*. Further, the jury here were told that the woman was a police spy. With regard to the second point, although it may be that the pills and powders given were harmless if taken in small doses, yet they would produce the effect for which they were given if taken in sufficient quantity. They thus amount to a noxious thing within the Act. *Cramp* (1877), 5 Q. B. D. 307; 49 L. J. M. C. 44; 14 Cox C. C. 390, 401; 44 J. P. 411; 42 L. T. 442; 28 W. R. 701; C. C. R.

Appeal dismissed.

Solicitors for the County Police: *Smith, Mammatt and Hale*, Ashby-de-la-Zouch.

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THOMAS MEADE (*a*).

Misdirection—Murder—Relation of Intoxication to crime discussed—Previous cases reviewed—Monkhouse (1849, 4 *Cox C. C.* 55) *and* Doherty (1887, 16 *Cox C. C.* 306) *approved.*

Intoxication may reduce homicide to manslaughter.

W. Jardine for the appellant was heard on February 22nd.

Bruce Williamson, for the Crown: The exact words of the learned judge in summing up were: "In the first place every one is presumed to know the consequences of his acts. If he be insane that knowledge is not presumed. Insanity is not pleaded here, but where it is part of the essence of a crime that a motive—a particular motive—shall exist in the mind of the man who does the act the law declares this: that if the mind at that time is so obscure[d] by drink, if the reason is dethroned and the man is incapable, therefore, of forming that intent, it justifies the reduction of the charge from murder to manslaughter." It cannot be said that these words conveyed to the jury that nothing would excuse a verdict of wilful murder except a finding of actual insanity. It is true that the learned judge used the phrase "the

(*a*) See p. 47, above.

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reason being dethroned" three times, but in each case it was accompanied by the reference to incapacity of forming the intent.

WALTON J.: In *Doherty* (above), Stephen J. distinguishes between (1) *incapacity* to form any intention, (2) not forming an intention, through drunkenness.]

The jury were directed that everyone is presumed to know the consequence of his acts. A man may be too drunk to intend any consequences. But here there was overwhelming evidence that appellant intended what he did: see the judgment of Stephen J. in *Doherty* at p. 308.

[PICKFORD J.: In substance, Coleridge J. said what Stephen J. there says as to drunkenness.]

He was described as "middling drunk" when they were last seen together that night, and he went home without assistance. Appellant afterwards gave a very coherent account of what had happened.

[PICKFORD J.: "Incapable" is the word quarrelled with.

WALTON J.: The incapacity must be of understanding the dangerous nature of what he was doing. What the learned judge meant was: "Did he intend to kill? and in that you must take into account his drunkenness." The presumption that a man intends the consequences of his acts may be rebutted. A jury may think that even a sober man cannot intend, is incapable of intending, an act.]

Here that was not suggested. Drunkenness only was relied on in this case. The jury could not have come to the conclusion that he had not the intent unless they had found that he was too drunk to form the intention.

[WALTON J.: The effect of drunkenness may be the same as that of the ignorance of a sober man who does a dangerous act in such circumstances that not even a careful man would know it to be dangerous. A man may be not insane, but so drunk as not to be capable of knowing the dangerous consequences of what he is doing, and therefore he cannot intend them.]

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In this case appellant was not so very drunk; there was no *delirium tremens*. See *Monkhouse* (above).

Jardine in reply. It may be that the words "incapable of forming an intention," used three times, may bear the subtle meaning put upon them by Mr. Justice Walton, but a jury would not think they meant "you may acquit if you think he was drunk enough." What the learned judge conveyed to them was: he must have been mad with drink to reduce the crime. What ought to have been left to the jury was—(1) was he capable of forming an intent? (2) Did he form the intent? *Doody* (1884), 6 C. C. C. 463; *Meakin* (1836), 7 C. & P. 297.

[Darling J.: *Grindley* (1 Russell on Crimes, 143 n. (6th ed.)), in 1819, was the first of these cases.]

The fist is not a dangerous weapon.

Appellant said he would do the deceased a certain grievous bodily harm. He did not, in fact, do so, and it ought to have been left to the jury to say whether such expressions used in drink must be taken seriously. I complain of the *omission*. The direction to the jury would lead them to suppose that there must be a permanent derangement, which is the reverse of what Day J. laid down in *Baines* (only reported in the *Times*, January 25th, 1886), when, according to Wood Renton on Lunacy, p. 912 (1896), he said, "it was immaterial whether the mental derangement was permanent or temporary, so long as it prevented prisoner from knowing the nature and moral quality of his acts."

In reply to the Court, *Bruce Williamson* said there was no evidence of threats before the assault, but there was of threats when they were quarrelling a few hours before the death.

Darling J. read the passage (above) in the summing-up. It is necessary to mention shortly the history of the doctrine of the effect of drunkenness on crime. Originally the law was, that although an insane man was not liable as a sane man was, yet a man suffering from what was called *dementia affectata*, *i.e.*, [illegible]al disturbance due to voluntary drunkenness, had no excuse (H[illegible]kins, P. C. Bk. I. c. 1, s. 6); "and he who is guilty of any crime whatever through his voluntary drunkenness shall be punished for it as much as if he had been sober." The contrary was first

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decided in *Grindley* (above) in 1819. Since then there have been many decisions, some of which have been cited to-day, to the effect that where intent is of the essence of the crime, that intent may be disproved by showing drunkenness. The decisions having the most bearing on this case are in *Monkhouse* (above) and *Doherty* (above). As this Court has often said, when a judge sums up he is not composing a law treatise, but speaking with regard to the particular case, and no judge can affect to give an exhaustive exposition of the law. All he must do is to direct the jury properly in the given case. We do not consider that it is part of our duty to enlarge the modern rule, and to use language wider than judges have previously used. Nor is it expedient to confer upon voluntary drunkenness a wider immunity than the partial immunity it has enjoyed since 1819. Now, in this case, as the summing-up pointed out, insanity was not pleaded. It is said that the learned judge confused the jury. But he warned them very carefully in the words: "but where it is part of the essence of a crime that a motive, a particular motive, shall exist in the mind of the man who does the act the law declares this" (his Lordship read the rest of the passage as set out above). The case for the appellant is put thus. It is admitted that his treatment of her was brutal (his Lordship read some of the details given in evidence). If he intended to do her grievous bodily harm and she died from the effects, that was murder. The defence is that you cannot presume this intent, because he was drunk at the time; but Coleridge J. rightly laid down the rule as to different degrees of drunkenness. Our decision rests on the following reasoning. Everyone is taken to intend the natural consequences of his acts, but this presumption may be rebutted (1) in the case of a sober man, in many ways: (2) it may also be rebutted in the case of a man who is drunk, by shewing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, *i.e.*, likely to inflict serious injury. If this be proved, the presumption that he intended to do grievous bodily harm is rebutted. (His lordship then read the passage in the judgment of Coleridge J. cited above.) It is said that these words would induce the jury to suppose that unless they found appellant insane, they would not be justified in finding him guilty of manslaughter. But the learned judge had expressly told the jury that there was no plea

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of insanity. From the details of the injuries inflicted, already mentioned, it must be assumed that appellant intended to inflict serious bodily harm upon the deceased. It was contended at the trial that this intent could not be presumed because appellant was incapable, by reason of drunkenness, of having such an intent. It then became the judge's duty to tell the jury what kind of evidence would shew this. Now, as to the precise words used in this summing-up, some of them cannot be traced to any other judge. Some of the language, it was said, was picturesque and figurative. No doubt it was; but it is quite easy in such language to express what is true, and the Court could not say that that language differed from the rule which they had just laid down. It is unnecessary to criticise the very words used unless we think them misleading and calculated to make the jury think that something which would amount to absolute insanity must be proved to entitle them to find manslaughter. But the language, in effect, does not vary from the true rule, and it did not imply that, short of insanity, drunkenness could not reduce murder to manslaughter. By their verdict the jury must have meant that he was capable of having the intent to injure or kill, and, in fact, did have such intent.

Appeal dismissed.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE WALTON AND MR. JUSTICE PICKFORD.

FRANK ALBERT MASON.

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Putting the effect of evidence wrongly to the jury is misdirection sufficient to cause a conviction to be quashed.

A defendant has the right to cross-examine a witness as to his mistake in identifying a person.

This was an appeal, by leave of Pickford J., against conviction and sentence.

Appellant was indicted before the Chairman at the Middlesex Sessions on Feb. 6th, 1909, for stealing a bicycle. He was found guilty and sentenced to twelve months' imprisonment with hard labour. He had previously pleaded guilty, at the same sessions, to another indictment for stealing a bicycle, and was sentenced by the Chairman to eighteen months' imprisonment with hard labour: those sentences were to be consecutive. He had been once previously convicted.

Curtis Bennett for the appellant (under sect. 10 of the Criminal Appeal Act), who was present. The case for the appellant was not properly put to the jury. It was a question of identity. The prosecutor, whose bicycle had been stolen, was only able to say that he saw a man riding away on his machine.

The prosecutor had gone into a house leaving his bicycle outside, and when he returned he saw a man, whose back was towards him, riding away on it. A police constable named Kimber said that he saw appellant riding past his house, and he identified him by reason of the fact that, as he passed, appellant turned his head so that his face was visible. Kimber gave a description of the man he had seen to a sergeant, but that description was as to clothes alone, and said nothing about the man's face. The description of appellant's face was given by someone else (on another charge) whose name was not mentioned. At the police station, the prosecutor identified another man altogether,

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but when appellant attempted to cross-examine the prosecutor as to this, he was stopped by the learned Chairman. The clothes worn by appellant on the day in question did not correspond in colour with the description given by Kimber. This was never pointed out to the jury, nor was the fact that Kimber's description to the sergeant contained no reference to the face of the man seen. On the contrary, the Chairman actually told the jury that Kimber had described to the sergeant the face of the man whom he had seen. Appellant was arrested about a week after the theft: the bicycle was not seen again. (He was stopped by the Court.)

Keeling, for the Crown: The evidence for the prosecution was sufficient. Kimber saw the man running away on the bicycle, pursued by the owner, and the owner pursued someone running away with his bicycle, and shouted after him. There was no evidence to shew that appellant had not the clothes on as described. All his witnesses could say was that they had never seen him in such clothes; they could not say he had none of that description. The summing-up was understood by the jury. In fact, the jury relied entirely on the evidence of Kimber, who had every opportunity of observing the thief, and who immediately picked him out from other men at the station. Any hesitation the jury had in convicting was removed when, after the summing-up, Kimber was recalled and explained fully and graphically to the jury the opportunity he had of seeing appellant as he passed on the bicycle.

Pickford J.: It was open to the jury to convict in this case on a proper direction of the Chairman. Appellant pleaded guilty earlier in the day to another charge, and this should have made the Court especially careful on any question of identity. The case for the prosecution practically rested upon the evidence of Kimber, who gave a description of a man whom he saw riding a bicycle, to the sergeant. The description given by him was: "A man, aged 25, 5 ft. 8 in. or 9 in., thin build, dressed in a brown dust coat, grey trousers, and light cap." Kimber gave no description of the man's face. The summing-up of the Chairman might lead the jury to suppose that Kimber had described the face of the man he saw to the sergeant, which was in fact not the case. Moreover he refused to allow appellant to cross-examine the prosecutor as to the failure to identify the right person at the police station, and he said

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nothing, upon this very important question, to the jury. The question of the colour of the clothes was only a small one, but it should have been pointed out to the jury that the description did not tally with the clothes actually worn by the appellant on the day in question. It cannot be said that the points as to identification were properly left to the jury. The Court does not criticise summings-up as if the judge was writing an accurate treatise of that part of the criminal law with which he was then dealing, but when one finds that the effect of evidence has been wrongly put to the jury, a miscarriage of justice has taken place.

Conviction quashed.

JOHN KEATING (*a*).

John Keating.

There may be sufficient identification of a person by his voice.

Darby, for the appellant: A man named Bates gave evidence that appellant had been seen on the Sunday after the burglary without a cap. A cap was found in the cellar, but it was not proved to be appellant's. Appellant stayed on the scene of the crime and never attempted to escape.

Singleton, for the Crown, was not called on.

Walton J.: This appeal is upon the ground that the evidence for the appellant was not put to the jury. The appellant's statement was before the jury, and doubtless it was present to their minds, although the Deputy-Chairman did not repeat it in terms. On the other hand, there was the evidence of the woman who was sitting in the house at the time, who knew appellant's voice, and who heard him speak. It is most important that the evidence for the prisoner should be put as carefully as that for the prosecution, but this case we think the jury were fully in possession of the facts cided upon them.

Appeal dismissed.

(*a*) See p. 48, above.

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John Woodman.

JOHN WOODMAN.

Appeal against sentence on a plea of guilty.

This was an appeal by leave of the full Court on February 22nd. The Lord Chief Justice had refused leave to appeal against conviction and sentence, and legal aid.

Appellant was indicted for larceny at Middlesex Sessions, before the Chairman, on February 6th, 1909.

He pleaded guilty to obtaining £1 by a trick. He had been ten times previously convicted, first in 1864.

Appellant appeared in person.

Sydenham Jones, for the Crown. There is a question as to the Court's power of substituting a sentence for the one passed at the trial.

Pending the decision in *Ettridge* (below: see p. 67), in which the same point arose, this appeal stood over.

C. a. r.

Victor George Ettridge.

VICTOR GEORGE ETTRIDGE.

The Court has power to alter sentence passed on a plea of guilty without quashing it—Davidson (2 *Cr. A. R.* 51) *overruled.*

Principles of the interpretation of statutes discussed.

The words "by the verdict" in sect. 4 (3) *of the Criminal Appeal Act are surplusage.*

This was an appeal against sentence, leave having been granted by Mr. Justice Pickford.

Appellant was indicted before the Chairman at the Middlesex Sessions on February 6th, 1909, for breaking and entering a shop, and also for malicious injury to property. He pleaded guilty to both indictments, and was sentenced to twenty-one months' imprisonment with hard labour upon the first, and three months' upon the second.

Warburton for the appellant (under sect. 10 of the Criminal Appeal Act), who was present. Appellant had been once before convicted in civil Courts, and twice, by court-martial, for fraudulent re-enlistment. The chaplain of the military prison where appellant had been previously confined had given his opinion that appellant had been driven to commit the offences with which he was charged owing to distressed circumstances. The Court had held in *Davidson* (2 Cr. A. R. 51) that, unless a verdict had been

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returned at the trial, they were unable to substitute, under sect. 4 (3) of the Criminal Appeal Act, one sentence for another. The present sentence was a severe one, and it was desired to obtain a revision of the Court's previous decision, with a view to a substitution of a less sentence for that already inflicted. The Court had already taken such a course, on a plea of guilty, in *Nuttall* (1908), 1 Cr. A. R. 180.

Bodkin, for the Crown: The sentence as it stood could not be supported. The facts disclosed were not known to the Chairman at the time of the trial. The decision in *Davidson* ought to be reviewed. In that case the Court had decided that where an accused person had pleaded guilty at the trial, they were unable to use the power given by sect. 4 (3) of the Criminal Appeal Act to substitute a sentence for that passed, because the power of substitution was limited to a case where a "verdict" had been returned. Sect. 4 (3) was only a machinery section, to be read with sect. 3 (c) of the Act. By the latter section, a qualified right of appeal against sentence was given to all convicted persons. The power of substitution given by sect. 4 (3) of the Act extended to all those persons, and there could be no division of them into persons who pleaded guilty and persons against whom a verdict had been returned. It could not be said that while, in the latter case, the Court could substitute one sentence for another, in the former case, because the accused pleaded guilty, that power could not be exercised at all. The man who admitted his guilt without attempting to fight the case would, in the event of the sentence passed upon him being set aside, escape punishment altogether. The Court might take the view that the sentence was too lenient, yet, if they quashed it on that ground, appellant would have to go free. The trouble arose over the words "warranted in law by the verdict," and the words "by the verdict," being surplusage, should be disregarded. In referring to the sentence which the Court had power to substitute, sect. 4 (3) of the Act enacted that it was to be such sentence "as they think ought to have been passed," and therefore the section was complete even without the words "warranted in law by the verdict," because it was very unlikely that the sentence which the Court thought ought to have been passed at the trial would be one not warranted in law. The words "by the verdict" were not words of limitation, but of illustration. He referred to the following cases on the inter-

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pretation of statutes: *Inhabitants of Everdon* (1807), 9 East, 101; *Fowler* v. *Padget* (1798), 7 T. R. 509; 4 R. R. 511; *Fisher* v. *Val de Travers Asphalte Co.* (1875), L. R. 1 C. P. D. 259; 45 L. J. C. P. 135; 24 W. R. 198; *Battle* (1870), L. R. 1 C. C. R. 248; 39 L. J. M. C. 115; 22 L. T. 728; 18 W. R. 956; 11 Cox C. C. 566; *Hall* v. *Knox* (1863), 33 L. J. M. C. 1; 4 B. & S. 515; 9 L. T. 380; 12 W. R. 103; *Vasey and Lally*, (1905) 2 K. B. 748; 75 L. J. K. B. 19; 93 L. T. 671; 54 W. R. 218; 69 J. P. 455; 22 T. L. R. 1; 21 Cox C. C. 49; C. C. R.; *Inhabitants of East Ardsley* (1856), 14 Q. B. at p. 801; *Salmon* v. *Duncombe* (1886), 11 App. Cas. 627; 55 L. J. P. C. 69; 55 L. T. 446. These cases dealt with the interpretation of statutes, and illustrated how the Courts had varied the wording of various sections from time to time, in order that they might fulfil the objects purposed for them by the legislature. Sect. 19 of the Act gave no assistance, for, on a reference by the Home Secretary, the Court had to hear and determine the case "as in the case of an appeal by a person convicted," so that the same difficulty arose.

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DARLING J. read the following judgment:—The appellant was charged at Middlesex Sessions, before the Chairman and other justices, upon two indictments—(1) that he did break and enter a shop and steal certain goods therein; (2) that he did then commit malicious damage by breaking the windows of the shop. He pleaded guilty on each indictment, and was sentenced to twenty-one months' imprisonment with hard labour on the first indictment and to three months' imprisonment with hard labour on the second, the sentences to be concurrent. Against the sentence on the first indictment he now appeals. Assuming this Court to be of opinion that a different sentence should have been passed, we should quash the sentence—as is provided by the Criminal Appeal Act, 1907, s. 4, sub-s. 3. But there occurs the question whether we have power to pass another sentence in place of that one. Sect. 3 of the statute enacts that "a person convicted on indictment may appeal" to this Court, "with the leave of the Court of Criminal Appeal, against the sentence passed on his conviction unless the sentence is one fixed by law." Here the appellant was convicted on his plea of guilty. He therefore has a right to appeal against the sentence passed upon him. Now, in order to see what

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this Court may do, we must turn to sect. 4, sub-sect. 3, of the statute, and it becomes plain that, should we think a different sentence should have been passed we should "quash the sentence passed at the trial." Here the difficulty occurs; for the section proceeds, "and pass such other sentence warranted in law by the verdict . . . in substitution therefor as they think ought to have been passed." Had this sentence in question followed on a verdict there would here be no difficulty. But it was pronounced after no verdict, and in consequence of the plea of guilty. Mr. Bodkin, for the Crown, has argued that the words "by the verdict" may be rejected by us, and the statute read as though they were not there. On the other side it is argued that this Court has already, and as at present constituted, held that we have no power in these circumstances to substitute another sentence for one quashed. We did so decide a week or so ago (*Davidson*, above). The point, however, was not argued on both sides, and we propose now to consider the question without reference to the opinion we formerly expressed. Where no meaning can be given to the words of a statute without rejecting some of those used in it, or where the statute would become a nullity were all the words retained, the Court has power to read a section as though the words which make it meaningless, or nullify it, were not there—for this it is enough to cite *Fisher* v. *The Val de Travers Asphalte Co.* (above) and *Lloyd* v. *Lloyd* (1885), 14 Q. B. D. 725; 53 L. T. 536; 33 W. R. 457; 49 J. P. 630; 15 Cox C. C. 767. This, however, does not nearly solve our present question; for the section, even were the words "by the verdict" retained, is not meaningless, nor is the section a nullity; for it would be operative in all cases in which the conviction is the effect of a verdict of the jury. We are distinctly of opinion that Parliament could hardly have intended that only those who should have been found guilty by a jury should be allowed to appeal against the sentence, which is not the act of the jury at all, but is fixed and awarded by the judge, whether the conviction follow on a plea of guilty or on a plea of not guilty and a verdict of guilty. We are of opinion that we may in reading this statute reject words, transpose them, or even imply words, if this be necessary to give effect to the intention and meaning of the legislature; and this is to be ascertained from a careful consideration of the entire statute. For this opinion many cases might be cited, but it is sufficient to refer to *Inhabitants of East Ardsley* (above), *Buttle* (above), *Vasey and Lally* (above), and especially

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Hall v. *Knox* (above) and *Salmon* v. *Duncombe* (above). In some of the cases cited to us, and notably in this last, the Court has attributed to the draftsman some defect of expression. But, strictly speaking, should ambiguity or contradiction in terms be manifest, it is unnecessary to determine whether this be due to bad drafting, to the hurried acceptance of amending words, or to the operation of rules resulting in the passing *en bloc* of some clauses of a Bill with no opportunity for either discussion or amendment. From a careful consideration of the whole of this statute we are satisfied that it was intended, as is plainly shewn in sect. 3, to give to those who might plead guilty an appeal against the sentence passed on their conviction. It appears to us unreasonable to place the Court of Criminal Appeal in the position of having either to leave the sentence untouched or to release the guilty person unpunished. No reason for making such a difference between the treatment of a man convicted on his own confession and that of one convicted by a jury has been suggested to us, nor can we imagine one. If such difference were intended it is nowhere affirmatively expressed, but is merely to be inferred from the presence in sect. 4, sub-sect. 3, of the words "by the verdict." Why those words are there we may guess unprofitably but cannot certainly say. They are not necessary to enable the Court to pass a substituted sentence for one quashed, where the appellant has been found guilty by a jury; and we cannot believe that they were deliberately inserted for the express purpose of disabling the Court or limiting its power on the consideration of an appeal against sentence by one who has pleaded guilty. Yet, were we to hold that these words "warranted in law by the verdict" do apply to a case in which sentence has followed on a plea of guilty, we could give them no other effect. When there has been a verdict, these words are plainly superfluous. Where (as in this case) there has been no verdict they cannot be read in any way which would not defeat what was plainly the intention of the legislature. In these circumstances we are of opinion that the rules to be collected from the cases decided on the interpretation of statutes justify us in disregarding those words and in holding that this statute gives us power to quash the sentence appealed from, and to pass in its place another sentence warranted by law. In view of the information before the Court, the sentence will be reduced.

Sentence reduced from twenty-one months' to twelve months' imprisonment with hard labour, to date from the conviction.

JOHN WOODMAN (*a*).

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John Woodman.

Severity of sentence—The Court will standardise sentences as far as possible.

Darling J.: Appellant has a very bad record. He has received three sentences of penal servitude, and was under police supervision when he committed the offence with which he is now charged, and to which he pleaded guilty. He was sentenced to eight years' penal servitude, followed by three years' police supervision, and that is a sentence which none of us in this Court would have passed. It is one of the advantages of this tribunal that it tends to a standardisation of sentences. Of course, no invariable tariff can ever be fixed, for it is impossible to classify guilt so nicely as to indicate it, even approximately, by the names given to the various crimes. But, with time, it is to be expected that the revision of sentences by this Court will tend to harmonise the views of those who pass them, and so to ensure that varying punishments are not awarded for the same amount of guiltiness. Following the decision with regard to substitution of sentences in *Ettridge* (p. 62, above), a sentence of five years' penal servitude with no police supervision to follow must be given in the place of the sentence passed at the trial.

Sentence reduced.

PIETRO CASTAGNA.

Pietro Castagna.

Murder—Circumstantial evidence.

This was an appeal, by leave of Pickford, J., against conviction. Appellant was indicted for murder before the Lord Chief Justice, at Chester Assizes, on February 19th, 1909. He was found guilty and sentenced to death.

Trevor Lloyd for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. Appellant and the deceased were two young Italians who lived together. On the night of the

(*a*) See p. 62, above.

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murder both of them were more or less intoxicated, which was their condition when the landlord of the house in which they lodged left them and went to bed. That was about 11 p.m. About 1 a.m. next morning, appellant was seen to drag the body of the deceased across the road in the direction of the river, leaving it lying in the gutter. When the body was examined, it was found to have four wounds produced by a stiletto, but no stiletto was traced to appellant. It was contended for the defence at the trial, that the wounds which the deceased sustained were received in a drunken quarrel with appellant. There was some evidence that the deceased was in the habit of carrying a knife, and the theory was that he attacked appellant, who, in defending himself, jerked the deceased's hand backwards so that it caused the wounds which were found. As to the wounds discovered in the deceased's back, no doubt appellant, being drunk at the time, used more violence than was necessary to defend himself, and so caused the other wounds that were found. There was no evidence of malice, the two men living and even sleeping together. Appellant ought not to have been found guilty at all. It was true that, at the trial, the doctor did not agree with the theory of the defence, and said that the wounds in the back could not have been inflicted as was suggested. The Lord Chief Justice did not put the points of defence to the jury.

Artemus Jones, for the Crown, was not called on.

DARLING J.: The Lord Chief Justice put plainly before the jury that there were two defences exploited, self-defence and manslaughter. Appellant and deceased had both been drinking on the night in question, and were left together at 11 p.m. If it is true that there was a struggle, and that appellant was driven to defend himself, it is curious that there were no cries for help, seeing that there were other people in the house. On the other hand, nothing of the kind was heard. It is said that appellant was under the influence of drink at the time, but he was sober enough to drag the body out of the house and across the road. So much for the defence of self-defence. As to manslaughter; there were a number of wounds, very dangerous wounds, found upon the deceased man's body. Those wounds do not point to chance medley. The shorthand notes do not give counsel's speech, but no doubt every point for the defence was fully dealt with, and

put before the jury. There is a question as to appellant's youthfulness, and that is a matter which neither the Lord Chief Justice nor this Court could deal with, but it will receive every attention at the hands of the Home Secretary.

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Pietro Castagna.

Appeal dismissed.

GEORGE WILLIAM TRUSS.

George William Truss.

Unlawful wounding—Degree of provocation.

This was an appeal against an order of Mr. Justice Pickford refusing leave to appeal against sentence.

Appellant was indicted for wounding with intent to do grievous bodily harm, before Mr. Justice Darling at Lincoln Assizes, on February 3rd, 1909. He was found guilty of feloniously wounding, and sentenced to eighteen months' imprisonment with hard labour.

Harold Wright for appellant (under sect. 10 of the Criminal Appeal Act), who was not present. Appellant desired to call further evidence to shew that the evidence given by his wife, the prosecutrix, was untrue. There was a witness to say that she saw the prosecutrix attempt to strike appellant in the face on the night of the assault, and also to give evidence of her intemperate and dissolute habits.

Walton J.: With regard to the conviction, that cannot be disturbed. With regard to the evidence proposed to be called, it does not appear that it would throw any new light on the case, and no leave can be given. As far as the sentence is concerned, it has to be remembered that it was a bad case of unlawful wounding. There was no evidence of any serious provocation at the time the offence was committed, and the wound which was inflicted pierced through the woman's clothing and penetrated 1½ inches.

Application refused.

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Edward Edwards

EDWARD EDWARDS.

Leave to appeal granted in order to prove previous good character.

Appeal from an order of Mr. Justice Pickford refusing leave to appeal against sentence.

He was convicted of being an incorrigible rogue at the County of London Sessions on February 1st, before the Deputy-Chairman, and sentenced to nine months' imprisonment.

Appellant, who appeared in person, said he could produce his army discharge and other papers, if he were given an opportunity. The Court, without going into the facts of the case, granted leave to appeal, in order that the necessary papers might be produced.

Leave to appeal granted.

Edward Hayes.

EDWARD HAYES (*a*).

Unimportant omissions in a summing-up do not amount to misdirection.

Bigham for the appellant, who was present. There was a substantial defence to which the Recorder did not refer in summing up. Several points ought to have been put which shewed that it was improbable that the prosecutor had in his possession the amount of money of which he said he was robbed. He made a statement as to his father being able to corroborate the fact that he had the money, but at the trial the father was not called to give evidence.

Gibbons for the Crown. There was ample evidence to support the conviction. It was true that the father did not give evidence in support of the prosecutor's story, but it was highly probable that the prosecutor did in fact have the money upon him, because he was a bachelor, thirty-five years of age, living at home, and therefore with no expenses. He was employed by the Manchester

(*a*) See p. 49, above.

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Edward Hayes.

Corporation as an electrician, and was earning good wages. It was Christmas time when the offence was committed, and it was most likely that the prosecutor took his money out of the bank and put it in his pocket for the holiday festivities.

WALTON J.: There was evidence upon which the jury could convict. The likelihood of the prosecutor having the money was before them, as, indeed, were all the points for the defence, although the Recorder did omit to point out one or two curious features in the evidence for the prosecution. A conviction cannot be quashed because a judge, in summing up, does not go through every detail of the case, though, perhaps, in this instance it would have been better if the Recorder had dealt with them.

Appeal dismissed.

EDMUND PETCH.

Edmund Petch.

A verdict of "wilful neglect through ignorance" is a verdict of guilty.

This was an appeal against conviction, on a point of law.

Appellant was indicted for manslaughter before Mr. Justice Darling at Lincoln Assizes on Feb. 3rd, 1909. He was found guilty of wilful neglect under sect. 1 (3) of the Prevention of Cruelty to Children Act, 1904, and sentenced to one day's imprisonment.

Edward Hart, for the appellant (under sect. 10 of the Criminal Appeal Act), who was not in custody. The verdict of the jury was "guilty of wilful neglect through ignorance." That amounted to an acquittal, because ignorance would negative intent. He referred to the judgment of Denman J. in *Gray* (1891), 17 Cox C. C. 299; C. C. R.; and *Senior*, (1899) 1 Q. B. D. 283; 68 L. J. Q. B. 175; 79 L. T. 562; 47 W. R. 367; 63 J. P. 8; 19 Cox C. C. 219; C. C. R. As to what "wilful" really means he referred to *Lewis* v. *G. W. Railway* (1877), 3 Q. B. D. 195, C. A.; and *In re Mayor of London and Tubbs's Contract*, (1894) 2 Ch. D. 524.

Paul Sandlands, for the Crown, was not called on.

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Edmund Petch.

PICKFORD J.: Appellant was indicted before Mr. Justice Darling for manslaughter. Very early in the trial it was pointed out that such a verdict would not be satisfactory, and that a verdict of wilful neglect might be found. The question is whether the verdict which the jury found does not amount to one of wilful neglect. The child (which was in appellant's care) was fed with unsuitable food, and died after a great deal of vomiting. It died of mal-nutrition. It was pointed out to appellant that he ought to send for a doctor, but he did not do so, and the food, which was obviously unsuitable, was not changed. It is said that the words the jury added negative the wilfulness, but there was a distinct finding that the neglect was wilful; the words "through ignorance" do not necessarily contradict that finding.

Appeal dismissed.

Frank Farr Leach.

FRANK FARR LEACH.

When at the close of the evidence for the prosecution there is no case to go to the jury, the Court, on a submission, ought to withdraw the case from them.

This was an appeal against conviction, on questions of law and fact.

Appellant was indicted for obtaining goods by false pretences, before the Deputy-Chairman at the Middlesex Sessions, on February 6th, 1909. H was found guilty, and sentenced to nine months' imprisonment in the second division.

Curtis Bennett, for the appellant (under sect. 10 of the Criminal Appeal Act), who was present. Appellant was convicted of obtaining goods to the value of 19*l.* 5*s.* 9*d.* from Messrs. Foote, and goods to the value of 5*l.* 10*s.* from Messrs. Edgeley, by false pretences. The only false pretence alleged in both cases was the assertion that appellant was carrying on a *bonâ fide* business as a builder's merchant and importer. The false pretence upon which the prosecution relied was the heading to the trade paper upon which appellant wrote. He gave orders to Messrs. Foote upon this paper, but when Mr. Foote was called he said, in cross-examination, that after appellant had written he made enquiries about him, and sent the goods relying upon the result of those enquiries. In Edgeley's case, a man named Bates gave evidence

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to the effect that the firm never parted with goods merely upon the strength of the heading of paper upon which letters were addressed to them. The carman, who took the roll-top desk, had discretion whether he would leave it without being paid for it. The carman did, in fact, leave the desk, and there was evidence that there was a *bonâ fide* business being carried on. A submission was made at the close of the case for the prosecution that there was no evidence to go to the jury; first, because the goods had not been parted with by reason of any false pretence; secondly, because if they had been so parted with, the prosecution had failed to negative the alleged false pretence, and had in fact shewn that there was some genuine business going on. If there was no case, the judge ought not to have left it.

[Walton J. referred to *George* (1908), 1 Cr. App. R. 168.]

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Laurie for the Crown. The conviction ought to stand, because appellant was also indicted for obtaining credit by fraud under the Debtors Act, of which there was evidence in support. The Court had power, under sect. 5 (2) of the Criminal Appeal Act, if they think that the jury were satisfied as to the evidence supporting another charge, to find appellant guilty of that charge. He referred to *Jones*, (1898) 1 Q. B. 119; 67 L. J. Q. B. 41; 77 L. T. 503; 46 W. R. 191; C. C. R.

Darling J.: At the end of the case for the prosecution, it was submitted by the defence that there was no case, whereupon a discussion arose as to what should be done. It was said to the jury that they must hear the defence. In our opinion there was then no evidence to go to the jury, for the prosecution had to give evidence of the false pretence. Counsel for the defence might have refused to call evidence, and relied upon any conviction being quashed by this Court But evidence was called for the defence. This, however, did not prove any case for the Crown—indeed it was of advantage to the defence, for it proved that some business was done. In these circumstances we have come to the conclusion that this conviction cannot stand.

Conviction quashed.

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Alfred Rouse.

ALFRED ROUSE.

Previous good character may be a ground for not imposing hard labour as part of a sentence.

This was an appeal against sentence, by leave of Pickford J.

Appellant was indicted for larceny, before the Chairman at the County of London Sessions, on February 11th, 1909. He pleaded guilty, and was sentenced to nine months' imprisonment with hard labour. There was no previous conviction.

Walton J.: Appellant was convicted of stealing £86 and jewellery, the property of his step-daughter. He pleaded guilty, and was sentenced to nine months' imprisonment with hard labour. It was a difficult case to deal with and, perhaps, unfortunate that a person of appellant's character should be sent to prison. He and the woman had been drinking together, and he undoubtedly stole the money and jewellery. We think this sentence ought to be varied to this extent; that, having regard to appellant's previous good character and the peculiar circumstances of the case, we substitute nine months' imprisonment in the second division for that passed at the trial.

Sentence reduced.

John Hill
and
Benjamin
Le Grice.

JOHN HILL and BENJAMIN LE GRICE.

Severity of Sentence.

This was an appeal against sentences, leave having been granted by Mr. Justice Pickford, and also an application for leave, refused by him, to appeal against convictions.

Appellants were indicted for being found at night, having in their possession, without lawful excuse, certain implements of housebreaking. They were tried before the Deputy-Chairman at the County of London Sessions on February 11. Both appellants were found guilty, Hill being sentenced to eleven months' imprisonment with hard labour, and Le Grice to fourteen months'.

Appellants appeared in person.

H. G. Robertson, for the Crown, was not called upon.

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PICKFORD J.: Appellants were in possession of the burglarious instruments, because the things were in the cart in which they were sitting. Hill gave his name as Thompson, and another man corroborated that. As soon as the police station was mentioned, appellants tried to run away. Appellants said they gave two men a lift, and that the things in the cart belonged to them. That was for the jury, and it is not our province to re-try the case. The conviction, therefore, must stand. As regards sentences, Le Grice was convicted in April, 1908, and received six months' imprisonment. Hill has not been convicted since 1904. As regards Le Grice, the sentence must stand, but Hill's sentence must be reduced to six months' imprisonment.

Sentence reduced.

CARMAN DEANA.

Carman
Deana.

In self-defence a person assaulted may do more than ward off a blow: he may strike back.

This was an appeal against conviction and sentence, leave having been granted by Mr. Justice Pickford.

Appellant was indicted for assault, occasioning bodily harm; also for a common assault, before the Deputy-Chairman, North London Sessions, on February 15th, 1909. He was found guilty, and sentenced to four months' imprisonment with hard labour, to be followed by deportation.

Dunbar for the appellant (under sect. 10 of the Criminal Appeal Act), who was present. The verdict was against the weight of evidence, and there was a serious misdirection. On January 26th, 1909, at 6.20 a.m. in the morning, the prosecutor, a cabman, had driven a fare to some address in the Gray's Inn Road. He went to a coffee stall where appellant was standing. The appellant's story was that the prosecutor put his hands in appellant's pockets, and ridiculed his appearance, appellant being an Italian. Appellant resenting this treatment, the prosecutor aimed a blow at him, which did not actually reach him, whereupon the appellant struck the prosecutor on the jaw, which was broken in two places. The blow was struck under provocation and in self-defence. Although

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appellant was an Italian he had lived in England eight years, and his story was corroborated by the coffee-stall keeper. The Deputy-Chairman said that the law of England did not permit the appellant to do as he had done. He ought to have taken out a summons. He had no right to return blow for blow. This was a misdirection on the law.

Wynne for the Crown. The jury knew the facts and they knew the law. They did not misunderstand what was said.

Darling J.: Appellant was convicted of assault occasioning bodily harm. He said that he did it in self-defence. If that were believed he would be entitled to be acquitted. Appellant said at the trial that the prosecutor gave him a blow with his fist, and that was corroborated. It was the duty of the Deputy-Chairman to put the defence to the jury. He did not put the defence at all. He gave a long rambling direction, which did not put the law with regard to self-defence at all plainly. He told the jury that no more than warding off a blow must be attempted by anyone attacked. That is not the law. The direction that ought to have been given was that if appellant was assailed by the prosecutor, and the jury believed that the prosecutor struck a blow at the appellant, the appellant was not limited to warding off a blow, but may be justified in striking one—a battery, in fact, in return for an assault which missed being a battery. The Deputy-Chairman said: "No one has a right to return blow for blow, it is an Englishman's way of settling differences, but it is not lawful, the proper way to proceed being to take out a summons." He did not indicate what the proper view of the law was. The conviction must be quashed, although the Court comes to this decision with great reluctance. The appellant is a man very likely to have committed an unprovoked assault. It is most important that where a person is likely to be convicted, that the proper direction should be given.

Conviction quashed.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE WALTON, AND MR. JUSTICE PICKFORD.

GEORGE FLATELEY.

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George Flateley.

Witness for appellant who appeared at the Police Court, and was bound over to, but did not appear at the trial, not called in this Court.

This was an appeal against an order of Mr. Justice Pickford refusing leave to appeal against conviction, and an application to call further evidence.

Appellant was indicted for housebreaking, before Mr. Justice Darling, at the Warwickshire Assizes, on February 17th, 1909. He was found guilty and sentenced to three years' penal servitude.

Tangye for appellant (under sect. 10 of the Criminal Appeal Act), who was not present. Appellant was charged with housebreaking and stealing 25*l.* in gold and silver. The robbery took place on February 10th, 1909, and when appellant was arrested on February 13th, 1909, a purse and 4*l.* 16*s.* in money was found upon him, the money including four crown pieces. A witness named Kate Waters gave evidence before the magistrates as to her having given appellant the purse in question. This witness was bound over to appear, but was not forthcoming at the trial, and it was suggested by the learned judge that her deposition should be read, but it was not read. It was also desired to call two other witnesses to prove how appellant became possessed of the crown pieces.

WALTON J.: We have considered this case carefully. The case against the appellant rested almost entirely upon the identification of the purse, and the prosecutor and his wife said that they knew the purse well, and that they had had it in their possession for a long while. This evidence was corroborated. Appellant and another man were seen looking through the windows of the prosecutor's house on the day on which the robbery was committed. That, however, does not amount to much, because appellant lived close by. But when he was arrested and charged, he pulled some money out of his pocket and said "That is my whack." £23 in

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George Flateley.

gold and silver was stolen beside the purse, and included in that sum were some crown pieces. Five of those crown pieces were found upon the appellant. When formally charged at the police station he said "All right." This sort of conduct cannot be disregarded. Appellant said that he got the purse from Kate Waters, and she gave evidence before the magistrates, though not exactly in corroboration. At the trial this witness did not come to assist appellant, and it now appears, that although a constable saw her with regard to giving evidence, she refused to attend at the trial.

Application dismissed.

James Dickinson.

JAMES DICKINSON.

Sentence reduced owing to fresh evidence.

This was an appeal against sentence, leave having been granted by Mr. Justice Pickford. Appellant was not present.

Appellant was indicted, before the Recorder at the Central Criminal Court, on September 11th, 1908, for maliciously inflicting grievous bodily harm upon Mary Pearson He was found guilty, and sentenced to five years' penal servitude. On February 17th he applied for leave to appeal, giving as a reason for the delay that he did not understand that an appeal had to be lodged within ten days, as he was completely unnerved by the severity of his sentence. Pickford J. accordingly granted him an extension of time.

6 *March.* *Wells Thatcher* for the Crown: All the facts were not before the Court of trial. A question has arisen as to the character of the woman.

The case was adjourned on March 6th for inquiries to be made.

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Sergeant Gillan, in giving evidence, said that he had made inquiries about the woman Pearson. He had discovered that she married a man seventeen years ago, and left him to live with appellant. She then left appellant and lived with another man, who bore the name of Pearson. She had been several times convicted for assaults, and was a common prostitute. She was made allowances of money by Pearson, and it was suggested that appellant went to attempt to obtain some of it.

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James Dickinson.

DARLING J.: Pearson is a woman who was married some time ago, and left her husband to be with appellant. She then left appellant and took up with Pearson, whereupon appellant re-visited her, frightening Pearson away. We have the Recorder's report upon this case, which makes it clear that he did not know those facts at the trial which are now before this Court. In his report the Recorder says that he thought the woman was respectable, and that appellant had been instrumental in breaking up the home. In view of the facts which have since come to our knowledge, the sentence must be reduced to eighteen months' hard labour to run from date of the conviction.

Sentence reduced.

EDWARD EDWARDS (*a*).

Edward Edwards.

"Incorrigible rogue"—Sentence reduced in view of previous good character.

Curtis-Bennett, for the Commissioner of Police: Appellant since 1904 had obtained a livelihood by begging. There were ten convictions against him for that offence. In May, 1908, he was convicted of being an incorrigible rogue and given seven months' imprisonment with hard labour; and in February, 1909, he came before the same Court again, and received nine months' imprisonment with hard labour. It appeared that appellant played a whistle in the street by the side of the kerb, occasionally asking passers-by for pecuniary assistance. On the day in question he was alleged to have been on the footpath and to have stopped ladies and whined for money.

DARLING J.: This is an appeal against sentence only. Appellant was sent to Quarter Sessions for sentence, having been convicted of being an incorrigible rogue. He has been sentenced nine or ten times under the Vagrancy Act. Under that Act a person begging may be convicted of being an idle and disorderly person; if convicted again of the same offence he may be convicted of being a rogue and vagabond, and if convicted again of the same offence he may be convicted of being an incorrigible rogue. How to sentence such a person is a matter of great difficulty, but we must

(*a*) See p. 70, above.

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take the law as we find it. In this case the facts are a little exceptional. Appellant served three years in the army, was invalided home and discharged in 1898, his character being marked "Very good." After that he was employed by several railway companies, but was rendered unfit for work by paralysis. He now goes about playing a penny whistle and asking for alms. That is begging, but it is difficult to see what else he can do. By statute, and by his conduct, the appellant has become "an incorrigible rogue." There are no traces of aggravating circumstances, for he has never been charged with dishonest or violent behaviour. It is very painful to have to pass any sentence at all. We think the sentence of nine months' imprisonment with hard labour is too much, and must be reduced to three months' imprisonment, with hard labour to the extent of appellant's capacity to do it.

Sentence reduced.

Solicitors: *Wontner & Sons*, for the Commissioner of Police.

Joseph Solomon.

JOSEPH SOLOMON.

Whether a prisoner who gives evidence that he is in respectable employment lets in thereby cross-examination as to a previous conviction (under sect. 1 (f) (ii) of the Criminal Evidence Act, 1898), quære.

This was an appeal against conviction, leave having been granted by Mr. Justice Pickford, also an application for leave to call further evidence.

Appellant was convicted for burglary before Mr. Commissioner Rentoul, at the Central Criminal Court, on January 17th, 1909. He was found guilty and sentenced to twelve months' imprisonment with hard labour, and recommended for deportation.

Huntly Jenkins for appellant (under sect. 10 of the Criminal Appeal Act), who was present. A constable gave evidence at the trial that he saw appellant come out of the premises and run away. He was caught by another constable shortly afterwards. Appellant relied upon an *alibi*, saying that on the night in question he was with friends. On his way home he went up a yard for a purpose,

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and seeing a constable coming, he ran away, thinking that perhaps he had been doing something wrong in using the place. Upon appellant's notice of appeal, it was submitted that the learned Commissioner did not leave the defence to the jury, and that appellant was wrongfully submitted by counsel for the prosecution to a cross-examination to credit. There was nothing in the first point, but as to the second, appellant never gave evidence as to his own good character, and therefore never let in the cross-examination which followed. Appellant was asked in examination-in-chief where, and for how long, he had worked in a certain situation. That was not putting his good character in issue. Appellant, giving his own version, gave evidence of his saying to the police officer when he was arrested, "I am a respectable man; I am earning my living; I never robbed anyone of a penny." Upon this, cross-examination as to credit was introduced, and proceeded with in spite of objections. For a prisoner to give evidence of a statement he actually made on arrest is a totally different thing from his giving evidence as to the truth of that statement.

[Darling J.: If appellant gave evidence of what he said to the police officer, and that is only to be taken to be evidence of that statement, a way out of the Criminal Evidence Act is at once made, because prisoners would be told that they had merely to make a statement alleging good character when they were arrested, and that could be made evidence at the trial without their being themselves attacked.]

Counsel referred to *Rouse* (1904, 1 K. B. 184; 73 L. J. K. B. 60; 89 L. T. 77; 52 W. R. 236; 68 J. P. 14; 20 Cox C. C. 592; 20 T. L. R. 68; C. C. R.); *Bridgwater* (1905, 1 K. B. 131; 74 L. J. K. B. 35; 91 L. T. 838; 53 W. R. 415; 69 J. P. 26; 20 Cox C. C. 737; 21 T. L. R. 69; C. C. R.); *Preston* (1909, 2 Cr. App. R. 24).

Pickford J.: Appellant was convicted of attempting the burglary of a pawnbroker's shop in Great Portland Street. Certain noises led the occupier of the adjoining house to have the premises watched. A police officer in Riding House Street saw appellant come out of No. 27, and having pursued him, appellant was ultimately captured. He had brick-dust and plaster on his clothes, though he said that he had been out to supper, and

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had only gone up the yard for a purpose. If the jury believed the policeman there was ample evidence for their consideration. As to the cross-examination, it is evident that evidence as to recent employment and its duration is not evidence of good character. Appellant, however, gave evidence of what he said on his arrest to the police officer, and upon that cross-examination as to previous character was admitted, revealing two convictions, one at Bow Street for assault, and one for keeping a gaming-house. It is said that such cross-examination was not justified, inasmuch as appellant's evidence did not come within the Criminal Evidence Act, 1898. It is a difficult point to decide, and we do not think that it is necessary to decide it in order to determine this case. Even assuming that it ought not to have been admitted, we think that no substantial miscarriage of justice has occurred, and therefore, under sect. 4 (1) of the Criminal Appeal Act, the appeal must be dismissed. It is most unlikely, having regard to the nature of the previous convictions, that their disclosure influenced the jury at all.

Appeal dismissed.

Joseph Hills.

JOSEPH HILLS.

Severity of sentence.

This was an appeal against sentence, leave having been granted by Mr. Justice Walton.

Shewell Cooper for appellant (under sect. 10 of the Criminal Appeal Act), who was present. Appellant was indicted for an assault occasioning bodily harm to a Mrs. Osborne, and robbery, before Mr. Justice Ridley, at Kent Assizes, on November 18th, 1908. He was found guilty and sentenced to five years' penal servitude. On November 24th, 1908, appellant applied for leave to appeal, which was refused. On December 1st, 1908, he appealed from that decision to the full Court, which dismissed the appeal. On January 15th, 1909, Mrs. Osborne, the old lady who had been assaulted, died from the results of the injuries she had sustained, and on February 24th appellant was put upon his trial for manslaughter at the Kent Assizes before Mr. Justice Bucknill. He was advised to plead guilty to the charge, and on doing so was

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sentenced to four years' penal servitude, the sentence to run concurrently with that received in 1908. Mr. Justice Bucknill made some remarks to the effect that if it were thought fit to make an alteration in the first sentence, the second might abate accordingly, whereupon application for extension of time wherein to appeal was made and granted, leave to appeal against the first sentence being eventually given.

[Darling J.: Treat it as an appeal against both sentences.]

Appellant had been in the employ of Mr. and Mrs. Banks, in whose house Mrs. Osborne, the deceased, who was the grandmother of Mr. Banks, resided. At the first trial it was assumed that 8½*d.* in money had been taken at the time of the assault, an empty purse being found. Evidence was given to that effect by Mrs. Banks. It afterwards came out that Mr. and Mrs. Banks knew, at the time of the trial, that the money had been found. The real defence was that Mrs. Banks committed the assault.

Pitman for the Crown: In the first case it was opened by the prosecution that robbery was the motive of the crime.

Darling J.: This is a remarkable case. Mrs. Osborne, an old lady ninety years old, made a dying deposition before a magistrate as to who her assailant was. As a result, appellant was convicted of an assault occasioning bodily harm. Mr. Justice Ridley assumed that the motive was robbery. At the trial in February, 1909, Mr. Justice Bucknill saw there was something unusual in the case, it having then been discovered that the money was known at the time of the first trial to have been found. Enquiries have consequently been made, with the result that there is now no doubt that appellant and Mrs. Banks were carrying on a clandestine *liaison*. The fact that Mrs. Banks is not guiltless does not absolve appellant from blame. It would appear that appellant did not rob the old lady, but the assault remains still an act of mere brutality instead of an assault with intent to rob, as Mr. Justice Ridley was led to believe. It is said that appellant pleaded guilty in order to screen Mrs. Banks. We have to consider this case apart from Mrs. Banks. The letters which passed between Mrs. Banks and appellant are by no means inconsistent with the guilt of appellant: the latter

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refers to Mrs. Osborne as the "old cuss." The sentence passed is not too much, having in mind the fact that the victim of this outrage was a defenceless old woman.

Appeal dismissed.

William Samuel Colclough.

WILLIAM SAMUEL COLCLOUGH.

Fresh evidence, not strong enough to quash a conviction, might induce the Court (if it had the power) to grant a new trial.

This was an application for leave to call further evidence, also an appeal against conviction and sentence, by leave of Mr. Justice Pickford.

Appellant was indicted for an indecent assault, before the Chairman at the Staffordshire Quarter Sessions, on February 19th, 1909. He was found guilty and sentenced to twelve months' imprisonment with hard labour.

W. H. Clay for appellant, who was present. Appellant was charged with indecently assaulting a girl by the roadside. Appellant and the girl arrived at a station by the same train, and appellant suggested that he should accompany her home, a distance of some three miles.

According to the girl's story, on the way appellant pushed her against a gate and attempted to interfere with her. In order to escape from him, she arranged to meet him at the same place the following Thursday, when she arranged for two friends to lie in waiting. There was a suggestion of an attempt at improper behaviour on the evening in question. The two friends appeared on the scene at that moment. Appellant and the girl parted seemingly good friends, and no complaint was made to her parents or to the police. It was desired to call two witnesses who passed appellant and the girl upon the road, and who could speak to the fact of there being no disturbance or struggle going on between the parties. Leave was given.

Arthur Salt was called and examined by *Clay*. He said he was a solicitor's clerk, living at Dilhorne. He had occasion to go along the road in question on the night when the assault was supposed to have taken place. He saw a couple leaning over

the gate. It might have been prosecutrix and appellant, he could not be certain. There was no struggling, and he heard no calling out. 1909 12 *March.* William Samuel Colclough.

Copestake corroborated this evidence.

D. Cotes-Preedy, for the Crown, was not called on.

DARLING J.: We cannot say that the verdict was unreasonable, or one that could not be supported by the evidence under sect. 4 (1) of the Criminal Appeal Act, 1907. The evidence called does not shew that the girl's story is untrue, and therefore the conviction must stand. This case shows what a great advantage it would be if this Court had the power to order a new trial, for it is in such a case as this that we might consider whether the power should be exercised. We have ordered witnesses to attend under sect. 9 (b) of the Criminal Appeal Act, and that section gives this Court wide powers, but it does not give power to order a new trial. If every witness who appeared at the trial were sent for, and the case gone into again, we should be substituting a trial by judges for a trial by jury—in this country a privilege of great worth to everybody. We think it well to make this statement, in the hope that the powers given to this Court may be reconsidered. As far as the sentence is concerned, in the light of the evidence which has been called, we think it is too severe, and it must be reduced to six months' imprisonment in the second division, sentence to run from the date of conviction. 18 *March.*

Sentence reduced.

Solicitors for appellant: *Challinors*, Hanley.

BEFORE

MR. JUSTICE LAWRANCE, MR. JUSTICE WALTON AND MR. JUSTICE JELF.

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William Smith.

WILLIAM SMITH.

Inconsistent statements of a witness.
Sect. 3 of 28 & 29 Vict. c. 18 (the Criminal Procedure Act, 1865) discussed.

Charles Mellor (under sect. 10 of the Criminal Appeal Act) for the appellant, who was not present. This is (1) an appeal from an order of Walton J. refusing leave to appeal; and (2) an application for leave to call further evidence; and I ask (3) for leave to appeal on the ground (which is not mentioned in appellant's own notice) of misreception of evidence. Appellant was convicted of rape before Lord Coleridge J. at the Leeds Assizes on February 18th, and was sentenced to five years' penal servitude. The prosecutrix was a girl of fifteen and a quarter years. All the witnesses for the prosecution were more or less children, the eldest being a girl of fifteen years. Prosecutrix before the justices denied having ever seen this last witness. Another witness was a small boy, appellant's son, whom the police constables, on coming to arrest appellant, had desired to remain in the house till their return, when they took from him a statement which they put into writing. This statement was to the effect of one which prosecutrix had related to the constables as having been made to her by the boy. The boy said in evidence that he was so frightened at the time that he did not know what to do. Objection was taken before the justices to the admission of the statement, but it was overruled. The statement was not disclosed to the jury at the trial, but it was put in under 28 & 29 Vict. c. 18 (Mr. Denman's Act), and the learned judge was cognisant of it. The boy gave evidence on the trial at variance with his statement. Thereupon the learned judge allowed counsel for the prosecution to treat him as hostile, to refer to the fact of the statement, and to the witness's variance from it.

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—
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Smith.

[Jelf J.: It seems to me that without treating the witness as hostile, the evidence of the statement could not have been got in. I do not see what ground there had been to give leave to cross-examine him.

Walton J.: I think I see why. The learned judge had the boy's statement before him.]

The learned judge gave as his reason that the boy had signed a statement as to what he had said to his father.

[Jelf J.: The hostility must be shewn in open Court. When one wants to cross-examine one's own witness, one cannot take as the ground of hostility the fact that he does not now make the statement which he had made before.

Walton J.: If the learned judge had thought the witness hostile, he might have allowed him to be asked if he had made a statement. See Stephen's Digest of the Law of Evidence (6th ed. 1904), Art. 131, and *Rice* v. *Howard* (1886), 16 Q. B. D. 681; 55 L. J. Q. B. 311; 34 W. R. 532.

Jelf J.: If the boy's evidence at the trial was correct, it would have disposed of the case. Your first point is that his evidence was wrongly shaken by the reference to the statement; and secondly, that the statement was wrongly obtained.

Walton J.: The former being a point of law, you had a right of appeal if the point had been taken within the time.]

The Court granted an extension of time for appealing on the point of law, and also leave to appeal on the facts.

Counsel asked for leave to appeal from the sentence also, and the Court granted leave.

Applications granted.

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Joseph Edwin Jones.

JOSEPH EDWIN JONES.

Fresh evidence—Expert evidence not called at the trial.

R. J. Lawrence (under sect. 10 of the Criminal Appeal Act, 1908) for appellant, who was not present. This is an application referred to the full Court (1) for leave to appeal, and (2) for leave to call further evidence. Appellant was convicted on March 5th, before Channell J., at the Staffordshire Assizes, of the murder of his wife on November 12th, 1908. The case which the prosecution put forward was that appellant murdered his wife and then tried to commit suicide, while that of the defence was that she tried to cut his throat and then committed suicide. Immediately after the occurrence appellant called in a neighbour: he was seen to be bleeding from the throat and his wife was found shot. On November 7th appellant had assaulted his wife, whereupon she had left home and had applied for a summons against him. Evidence was called by the prosecution on three points: (1) that on November 9th appellant had gone to a pawnbroker's to seek to buy a revolver; (2) that on the afternoon of November 12th, very shortly before the occurrence, appellant had said in the presence of two women that he was waiting for his wife to come back, when he would do his work on her, but these two women had not been called before the justices; and (3) that the shot wounds on the deceased woman could not have been self-inflicted, to establish which point certain medical witnesses, who, however, were not experts on this special subject, were called. Appellant asks for leave to call further evidence to rebut the evidence of the prosecution given at the trial on these three points. The first point appellant denied on oath at the trial and set up an *alibi* as to it. Since the trial the man who, in fact, tried to buy the revolver has been found. He has been confronted with the two witnesses for the prosecution who identified appellant, and they admit they were mistaken. It is desired to call this man and those two persons. On the second point he desires to call his son and another witness who heard him on the morning of November 12th praying his wife to return home, and heard her refuse to do so; also another person to whom the wife on the same day said she was not going home.

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[JELF J.: Assuming the *alibi* on the first point to be established, if we were to allow further evidence on the second point, it would really be granting a new trial.]

This evidence has only recently come to appellant's knowledge, and the evidence of the conversation just before the occurrence had not been called by the prosecution before the justices.

[WALTON J.: As to the third point there are experts who have made practical tests as to such matters, and can speak with some certainty. But the question is whether appellant ought not to have called such witnesses at the trial.]

The expert the defence has in view is a London man, whose evidence has only just been ascertained.

LAWRANCE J.: We think you are entitled to leave to appeal and to call further evidence. There are three classes of witnesses that you desire to call—first, as to the visit to the pawnbroker's; secondly, as to the conversation with the deceased on the morning of November 12th; and, thirdly, as to the nature of the wounds.

Counsel asked expressly for leave to call appellant's son on the second point.

WALTON J.: It is not unusual for the Court, in giving leave to call evidence, to indicate the kinds of testimony, leaving it to the Registrar to decide as to the actual witnesses, which he may do upon consultation with counsel. If subsequently the Court thinks other witnesses should be called, it will call them.

Leave granted.

WILLIAM THOMAS PERRY AND HARRY HARVEY.

William Thomas Perry and Harry Harvey.

The Court will not readily hear witnesses who were at the trial and were not called. Before doing so it will require a strong primâ facie *case of a miscarriage of justice.*

H. D. Roome for appellants (under sect. 10 of the Criminal Appeal Act), who were not present. Perry appeals from an order

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William Thomas Perry and Harry Harvey.

of Pickford J. refusing leave to appeal against conviction; and Harvey's application for leave to appeal against conviction has been referred by Pickford J. to the full Court. Both appellants apply for leave to call further evidence.

They were convicted on February 19th, 1909, before the Chairman of the County of London Sessions, of stealing and receiving a horse. Perry was foreman to the prosecutors, who had in September, 1908, sold three horses to Harvey. At that time prosecutors had in their stables a horse which had been branded on the off forefoot with the number 821, which was a more valuable horse than any of the three sold to Harvey. Prosecutors had bought the horse in the month of March previous for the sum of 45*l*. At the time when they bought it they had it examined by their veterinary surgeon, the witness Roberts, who reported it as sound. It was a horse of somewhat peculiar appearance, and it was admitted by appellants that the horse produced at the trial was one of similar appearance. The horse produced at the trial had been sold by Harvey in October, 1908, for thirty-three guineas to a man named Bays. Two witnesses called by the prosecution—a man named Mason, who had on one occasion led the horse 821 to prosecutor's yard, and a man named Bishop, who was their under-foreman—identified the horse sold by Harvey to Bays as being the horse 821. It must also be taken from the evidence of Roberts that he likewise identifies it, though he does not expressly say so. Appellants say that the horse sold to Bays is absolutely unsound, and cannot possibly be the one certified in March by Roberts as sound. The horse was examined by two veterinary surgeons in January and February respectively of this year, who stated it to be quite unsound. This is the further evidence which appellants ask leave to call. Three horses, including the one sold by Harvey to Bays, were produced outside the Court, and the jury had an inspection of them, but of a very irregular and unsatisfactory kind. There was nobody to point out to them which was the horse in question, it was late, and the light was bad, and there was a crowd standing around talking to the jury.

The veterinary surgeons were present on subpœna, but they were not called owing to the desire of the two counsel for the two appellants respectively to have the last word with the jury.

[Jelf J.: Is not this one of the worst examples of the kind?

They abandoned evidence for that purpose, and then tell the Court of Appeal that it is there to put the matter right.]

Appellants' counsel had put the point in cross-examination, and they also relied upon a satisfactory inspection of the horse by the jury.

[JELF J.: This was a case of lying by. If we were to allow it we should be flooded with appeals.

WALTON J.: If the Court sees that there has been a miscarriage of justice, for myself, I think that misconduct of his case by the prisoner ought not to prevent an appeal being allowed. Here, at the close of the case for the defence, the prisoner Harvey interjected, "What about the vets.?" And his counsel said, "I must use my own discretion."

It is a matter of great public importance from the other point of view, because there was evidence on the matter before the jury. You are asking us to hear these two witnesses, and on their evidence, to quash a conviction which may be right.

JELF J.: Can we re-hear the whole case? There is not a single instance of that having been done. The Act is against it.]

It might be re-heard on this point only.

[JELF J.: Are there affidavits by the veterinary surgeons?]

Affidavits by them and appellants' solicitor, the latter being to the effect that it was against his judgment that the surgeons were not called, were read by counsel.

[JELF J.: Roberts says the horse was absolutely sound. You had your witnesses there to contradict him. As to the contention that this Court is here to remedy such matters, I repudiate the notion that this Court was constituted to enable people to make "a shot" one way first and then another. If you have leave it must be understood to be a most exceptional case.

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LAWRANCE J.: Do you put the responsibility on the prisoners or on counsel?]

On counsel. It was an exercise of counsel's discretion which turned out not to be wise.

[WALTON J.: A very strong case must be made out to justify the interference of this Court. If it were a civil case the argument would be unhearable. But if the Court thinks a miscarriage of justice may have occurred it would not allow a technical point to stand in the way. I think you must take Roberts as identifying the horse.

JELF J.: Was there evidence of identification by other marks?]

Admittedly the general appearance was similar. But if the two veterinary surgeons are right, this evidence would have been a conclusive answer.

WALTON J.: The case here is that evidence was not called which, according to Mr. Roome, *must* be called if justice is to be done. The important question is whether the horse which was sold by Harvey to Bays is the one which had been branded 821 by the prosecutors.

The appellants' case is that it was not so. There was evidence as to how it had been dealt with by Perry, with a view to show that it had been dishonestly dealt with—but I do not say that the evidence was conclusive. There was the evidence of the horsekeeper, Bishop, who swore that it was the same horse, and also the evidence of Mason, but he had not had such a good opportunity of knowing it. But looking at the shorthand note and at the summing-up of the judge it is clear that Roberts also swore that the horse was the same. The horse was rather a remarkable one in appearance. Leave is now asked to call two veterinary surgeons who examined the horse in January and February respectively. The price of the horse branded 821 was £45, and Bays paid thirty-three guineas for the horse which he bought from Harvey in October, 1908. The importance of the veterinaries' evidence is that the horse sold to Bays suffers, as they say, from various ailments which prevent it from being a sound horse, whereas 821 was a sound horse. We

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are asked to quash the conviction upon hearing these two witnesses and weighing their evidence against that of the others whom we should not hear orally, unless we did that which, undoubtedly, we have power to do, viz., hear all the witnesses again. But we ought not to substitute a trial by three judges for a trial by jury, unless it is clearly made out that justice requires it. We have no power to order a new trial. The defendants' counsel deliberately elected to abandon this evidence in order to have the last word with the jury, and relying upon the jury seeing the horse.

On the other hand, in my opinion this Court ought not to consider itself bound by any hard and fast rule never to allow further evidence to be called where the fact that it was not called at the trial was due to the mistaken conduct of the case by the prisoner or by his advisers. If it was plainly made out that justice required it, I think this Court would interfere to protect a man from the result of bad management or misconduct of his case at the trial.

Though we think that this evidence was of some importance, we do not think that it was of such vital importance as the appellants contend, and we do not think that if counsel had considered it so he would have refrained from calling it.

It cannot be said that a sufficient case is made out here that there has been a miscarriage of justice, and unless that is made out we ought not to interfere.

Applications refused.

BEFORE

MR. JUSTICE CHANNELL, MR. JUSTICE JELF AND MR. JUSTICE COLERIDGE.

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Samuel Harrison.

SAMUEL HARRISON.

Severity of sentence—The maximum sentence warranted by law should be reserved for the worst cases of the particular offence.

Where, on a trial for rape, the prosecutrix is absent in suspicious circumstances, so that a conviction except for a minor offence (e.g. indecent assault) would be unsafe, the judge, in passing sentence, ought not to be influenced by the more serious charge.

Detention before trial ought to be taken into account in passing sentence.

This was an appeal by leave of Pickford J. against conviction and sentence. Appellant was convicted on February 17th before Darling J., at the Warwick Assizes, of an indecent assault, and was sentenced to two years' imprisonment with hard labour. He and three others were indicted for rape. They were arrested on July 28th, and were committed in custody to the Autumn Assizes. Meanwhile the prosecutrix disappeared, and as she did not appear at the Autumn Assizes, Jelf J., on November 23rd, adjourned the case to the Winter Assizes, admitting the prisoners to bail. The prosecutrix was admittedly a woman of bad character. Darling J. directed the jury that, in the absence of the prosecutrix, it would be most dangerous to convict the persons of rape, or of assault with attempt to rape, but that they might be convicted of an indecent assault.

Cracroft (under sect. 10 of Criminal Appeal Act) for appellant, who was present. It is submitted that inasmuch as the prosecutrix was not there to negative consent, it was as little open to the jury to find a verdict of indecent assault as to find one of rape. The fair inference from the whole of the evidence is that the prosecutrix was prepared for, and consented to, all the acts of indecency committed. The learned judge did not adequately direct the jury on this point, and the failure amounts to a misdirection.

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[CHANNELL J.: She was knocked down. That would be some evidence of an assault. It is very doubtful if a person can consent to be knocked down. If it had been necessary for the jury to decide exactly what had happened there might have been some difficulty. But there was ample evidence on which they could convict of indecent assault.]

As to the sentence, it is the maximum. It is submitted that the learned judge was biassed by the circumstances of very gross vice which were disclosed in the evidence, and by the depravity of the district. The length of time between arrest and trial, four months of which were spent in prison, was not taken into account.

[CHANNELL J.: It is the heaviest sentence that could be passed. If one takes into consideration the earlier imprisonment, it exceeds the heaviest sentence. I generally allow for the previous imprisonment by counting it at the rate of one-half.

JELF J.: The maximum is intended for the worst cases. There are cases of old men committing indecent assaults upon little children with circumstances of great brutality, and yet they can only receive two years' imprisonment. The badness disclosed here is the badness of immorality.]

H. Rowlands, for the Crown: The learned judge made inquiries as to the neighbourhood, and as a result he felt it his duty to pass a sentence which should be a deterrent in order to protect other women.

[CHANNELL J.: That is an element which one must sometimes take into consideration.]

CHANNELL J.: We are all of opinion that there was ample evidence of an indecent assault, and that there is no ground for interfering with the verdict. The point as to misdirection is not made out. As to the sentence, the Court is reluctant to interfere with judges who have had all the facts before them. In this case the learned judge was naturally and properly incensed at the state of affairs disclosed. He possibly

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may have thought the absence of the prosecutrix very suspicious; but he was not at liberty to take into consideration that in fact the prisoners might have been guilty of rape. We think that he must have taken that possibility into consideration.

It was admittedly a very bad case, but there was the fact that the prisoners had on previous occasions had relations with the prosecutrix, and an indecent assault with a view to such relations is different in the case of a woman of her character. The maximum sentence must, as presumably the law intended, be reserved for the worst cases.

In this case, also, the prisoners had already been four months in prison. The Court thinks that the sentence ought to be reduced to one of twelve months' imprisonment with hard labour, to date from the conviction.

These remarks apply equally to the other three prisoners, though they have not appealed. Under the Act a power of revising sentences is reserved to the Home Secretary. An appeal to this Court will not, therefore, be necessary.

Sentence reduced.

James Curley.

JAMES CURLEY.

If the proximate cause of an act leading to death is terror caused by another, the latter may be guilty of manslaughter, though he used no violence.

Roome for appellant (under sect. 10 of the Criminal Appeal Act), who was not present. This is an application for leave to appeal against conviction, which was referred to the Court by Pickford J. The notice of appeal was settled by appellant himself, and I ask for leave to amend it by raising a question of law, and for an extension of time for that purpose.

Appellant was convicted of manslaughter, before Phillimore J., at the Central Criminal Court, on March 4th, and was sentenced to eight years' penal servitude. It is submitted that the learned Judge in his summing-up misdirected the jury in directing them, that "if from a well-grounded fear of violence from the prisoner the deceased woman went to the window to call for assistance and by accident overbalanced herself, it would be a case of manslaughter."

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[Jelf J.: If two people are fighting in anger and one of them falls over and is killed, it is a case of manslaughter against the other.

Lord Coleridge J.: If a person were standing at the edge of a cliff and another were to hold up his fist before him in a fighting manner, so that he fell over and was killed, it would be a case of manslaughter against that other."]

I submit that it would not be so unless he knew that the cliff was there.

[Channell J.: In that case it might be murder. I think the evidence here was that the prisoner followed the deceased woman by forcing his way into the room after her. He did not give evidence at the trial.]

They were both in the room. He did not force his way in, She threw something at him. He stated that before the coroner. and his statement was put in by the prosecution at the trial.

[Jelf J.: The fact that the prosecution put in something said by the prisoner before the coroner or elsewhere does not relieve him from the necessity of giving evidence if he wants to rebut the evidence of the prosecution.

Channell J.: I quite agree. Counsel know the danger which often exists in calling the prisoner, and so they seek to say that his statement is the same thing.]

Channell J.: We give leave to appeal and to raise the point of law, if appellant is so advised. But we are inclined to think that the direction was right if it was made clear to the jury that the accident was caused by the violence of the prisoner. One reason for giving leave is that the sentence may be considered when the facts which the jury must be considered to have found are fully ascertained, as if the case should appear to the Court to be one of manslaughter, but of the accidental kind, the Court may think that the sentence requires alteration.

Application granted.

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Richard Martin.

RICHARD MARTIN.

Slight inaccuracy in summing-up does not amount to misdirection.

Appellant was convicted of stealing, at Manchester Assizes, before Mr. Commissioner Mellor, on 26th February, 1909, and was sentenced to five years' penal servitude.

The case for the prosecution was that appellant, in concert with others not before the Court, had carried out a system by the purchase of postal orders at one post office, cashing them at another, and re-purchasing postal orders at the first for the accumulation of cash at the first post office, with a view to a robbery therefrom. He was identified by different witnesses who had seen him in different stages of the transaction, including the final one, when carrying away the proceeds in a cart. The defence was an *alibi*, extending to each occasion of such identification.

The Hon. H. Gorell Barnes (under sect. 10 of Criminal Appeal Act) for appellant, who was not present. Appellant applies on three grounds:—First, the learned Commissioner misdirected the jury in his summing-up, inasmuch as he said to them that whereas "in one sense" it was the duty of the prosecution to make out their case, the duty of proving his *alibi* lay with the defendant, and he must prove with reasonable certainty to the jury that he was not present.

[Channell J.: It seems to express what I often say. The defendant would not have to establish affirmatively his *alibi* unless the prosecution had established such a case as would otherwise be believed.]

Secondly, the learned Commissioner stated the evidence of identification more strongly to the jury than was warranted.

[Channell J.: If that were so, slight mis-statements by a judge in summing-up do not constitute misdirection, and can only give ground for an appeal when they raise a presumption that there has been a miscarriage of justice. I have a strong objection to setting aside the verdict of a jury where it is not said that it could not reasonably have been given.]

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Thirdly, the learned Commissioner should not have pointed out to the jury that there was a possibility of a mistake as to the evidence of the *alibi* without likewise pointing out to them that there was equally a possibility of a mistake as to the evidence of identification. It is submitted that this is at least a case for a final appeal.

Jelf J.: We think there should be no leave to appeal. This was eminently a case for the jury. So long as they are not misled, it is impossible for us to come to a different conclusion. There may be cases in which, though they are *primâ facie* proper for the jury, something may have gone wrong and may have led to a miscarriage of justice, so as to bring the case within the last ground mentioned in sect. 4, sub-sect. 1, of the Act. If the judge, by some mistake, has made an inaccurate statement upon some very important point, so as to lead the minds of the jury in a wrong direction, a prisoner would have, at least, leave to appeal. These applications are in the nature of a rule *nisi*.

Application dismissed.

BEFORE THE

LORD CHIEF JUSTICE, MR. JUSTICE DARLING,
AND MR. JUSTICE JELF.

JOHN FAIRCLOUGH.

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John
Fairclough.

Severity of sentence—Post Office servants.

This was an application for leave to appeal against sentence, the application being referred to the full Court by Mr. Justice Channell.

Appellant was indicted for larceny, before the Lord Chief Justice at Liverpool Assizes, on the 9th March, 1909. He pleaded guilty, and was sentenced to five years' penal servitude.

George Elliott for appellant, who was not present. Appellant had been in the service of the Post Office at Liverpool as a sorter since 1901. During that time, up to September, 1908, he had borne an unblemished character. The charge against him was that he had abstracted brooches and other jewellery from postal packages in November, 1908. He confessed to this, and also owned to taking a gold watch from a Canadian parcel in September, 1908. Evidence was given of other thefts, but there was no evidence of any offence before September, 1908. There were matters which were not brought to the notice of the Lord Chief Justice, namely, that appellant had not attempted to conceal the other larcenies, and had given every assistance when charged. This was given in evidence by Mr. Whitehurst, the Post Office detective, who was called before the magistrates. Considering appellant was only twenty-four years of age, and the son of most respectable parents, some reduction might be made in the sentence which would be consistent with justice.

[JELF J.: Five years' penal servitude used to be the minimum for the first offence in this class of cases.]

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The sentences given in respect of these offences are less severe than they were. See *Noble* (1908, 1 Cr. App. R. 30).

Darling J.: Appellant pleaded guilty to the charge. The truth was that he had committed several robberies, and had become possessed of valuables worth over 100*l.* We are asked to say that the sentence passed was excessive. All the facts which are brought to our notice now were before the Lord Chief Justice at the trial. Mr. Whitehurst said that as there was no registered post to Canada, parcels containing things of value, such as jewellery, were marked "valuable." It was therefore very easy for appellant, who was a sorter, to commit the kind of offence with which he was charged. The sentence given would probably have been much heavier if all the extenuating facts had not been known to the Lord Chief Justice. The sentence must stand, but would run from the date of conviction.

Application refused.

Solicitors for appellant: *Bower, Cotton & Bower.*

Joseph Edwin Jones

JOSEPH EDWIN JONES (*a*).

Further evidence—Witnesses at the trial recalled to contradict their previous evidence.

Appellant was present.

The following witnesses were called.

Edward William Bayley, grocer's assistant, Wolverhampton (not called at the trial): On the 9th November, 1908, at about 5.50 p.m., he went to the pawnbroker's shop kept by Messrs. Langman, and asked to be shewn a revolver, as he wanted to purchase one for a friend. Westworth, the manager, asked witness if he had a licence, and on the latter replying that he had not, he was told he could not be served. He was wearing a brown cap, fawn coat, and dark trousers. (No cross-examination.)

Robert Westworth, pawnbroker's assistant, Wolverhampton: He remembered Bayley coming to attempt to buy a revolver. It was

(*a*) See p. 88, above.

not appellant who came, though at the trial he so believed, and gave evidence to that effect: he wished to contradict that evidence now: he was convinced that he was mistaken. (No cross-examination.)

George Harry Jones, estate agent, Wolverhampton: He was present in the pawnbroker's shop when Bayley came in: he had at the trial identified appellant as the man who attempted to buy a revolver: he was now satisfied that that man was Bayley. (No cross-examination.)

Fanny Jones, Wolverhampton (not called at the trial): She was at home on November 12th, 1908. About 10.30 a.m. she saw appellant, his wife and son walking together. As they passed her house she heard appellant's wife tell him that she would not go home in any circumstances. (No cross-examination.)

Jane Davies, Wolverhampton (not called at the trial): She saw Mrs. Jones, the deceased woman, at 11.30 a.m. on November 12th, 1908. In course of conversation Mrs. Jones told witness that she did not intend to go home. (No cross-examination.)

Edward John Churchill, Agar Street, Strand, London (not called at the trial): He was a gunmaker, and had a lifelong experience in firearms. He had assisted the Treasury as an expert in the Moat Farm and Luard cases. He had seen the pistol found on the premises, and had made experiments with it. According to the evidence given he was of opinion that the pistol was held from three to six inches away from the deceased woman's head when it was fired. He thought the explanation of there being two wounds in the head was the fact that two balls were fired from the pistol at once. The powder marks upon the deceased woman's face would be caused by the pistol being fired within six inches at least from her head. This he had tested by firing at a head drawn upon paper fastened to a board. The same experiment had been tried upon pigs' heads. Upon one pig's head (produced) fired at from a distance of two feet, there were only faint traces of powder. Fine grain powder had been used for that experiment. The extent to which powder marks would appear depended upon the amount of powder used. In order that the wadding should enter the wound the discharge must take place within six inches of the object fired at.

Cross-examined: The further off the pistol was held the greater

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would be the distribution of the powder and less dense would be the marks.

R. J. Lawrence submitted that it was true that the learned judge in summing up had told the jury that the incident of the attempted purchase of a revolver was not important, but the jury probably thought that appellant's denial of his being the intending purchaser, in the face of the evidence given by Westworth and Jones, rendered him an untruthful witness altogether. Westworth and Jones had given evidence before this Court stating that they were mistaken at the trial, and that the person who came to the shop was Bayley. If the appellant's denial could have been shewn to be accurate at the trial, this would probably have induced the jury to give credence to the whole of his statement. Credibility had been an important factor at the trial, inasmuch as the learned judge had told the jury that the defence depended upon whether they could accept appellant's story. As to the two witnesses, Wall and Selby, to whom appellant was supposed to have said that he was expecting his wife home and that he had a big job to do, their evidence, in the light of the fresh evidence given by Fanny Jones and Jane Davies that the deceased woman was not intending to go home, was untrustworthy. Mrs. Wall had said that she gave particulars of the conversation to a police constable on Nov. 13th. Although the proceedings before the coroner and magistrates were going on, neither of these two witnesses were called. As to the expert evidence now given, the importance of that was to shew that the pistol must have been held close to the head, and not some distance away as given in evidence by the doctors at the trial. Appellant's story that he was sitting drinking cocoa alone in the kitchen when his wife came in, that he remembered finding his throat cut, that he struggled upstairs and found his wife shot dead upon the bed, that he found the pistol near the body and brought it down to the kitchen, and that he thereupon called to a neighbour, was the story which he had told from first to last. It was not the act of a guilty man, with the razor and pistol lying on the kitchen table, to go to the door and call a neighbour in. The deceased woman was left-handed, and the defence was, that after cutting her husband's throat she shot herself in the head behind the left ear. As to the wounds upon appellant's throat, although there was evidence to shew that it was slightly more probable that they were self-inflicted, yet there was evidence to prove that they might not have been so produced.

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Mackarness and *F. W. Sherwood*, for the Crown, were not called on.

The Lord Chief Justice: I have no doubt that the arguments presented to this Court were fully addressed to the jury at the trial. We have to investigate this case having regard to the question of the possibility of a miscarriage of justice. In all these cases of murder, it is much safer to rely upon admitted facts. As far as the theory of the defence is concerned, it must be remembered that there was no motive for the woman doing what she is supposed to have done. It is admitted that the body was found upstairs, and that there was a trail of blood upon the stairway. It is unnecessary to say whether it was a double trail, or whether the traces of blood were caused by a person going up or coming down the steps. Then there was a pool of blood in the kitchen. The wound which the deceased woman was found to have sustained was a wound which would render her unconscious almost at once, and therefore the suggestion made by the defence lacks satisfactory support. With regard to Bayley's evidence, it must be taken that he, and not appellant, was the man who attempted to purchase a revolver from Westworth. But even taking it to be so, the incident has no bearing of any importance, and must be disregarded, as the jury at the trial were told to do. Because two women have given evidence before this Court that they heard the deceased woman say she was not going home, two other women, who gave evidence at the trial to the effect that appellant had told them that he was expecting his wife home, are supposed to be telling untruths. It is difficult to see how the two things are connected. It is also suggested that the verdict depended upon the doctor's evidence at the trial, that the wound upon the woman's head could not have been self-inflicted. Mr. Churchill says that the pistol must have been held within six inches. Even assuming that what he says is correct, it is highly improbable that the deceased woman would shoot herself in that way. The summing-up was most careful in every respect.

Appeal dismissed.

Solicitor for appellant: *Arthur N. Brevitt*, Wolverhampton.

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William Smith.

WILLIAM SMITH (*a*).

The judge is entitled (under sect. 3 of 28 & 29 Vict. c. 18) to permit a witness to be treated as "hostile," although the alleged inconsistent statement is not in evidence, but is only before him.

This was an appeal against conviction and sentence, leave having been granted by the full Court.

Appellant was indicted for rape, before Mr. Justice Coleridge, at Leeds Assizes, on February 18th, 1909. He was found guilty and sentenced to five years' penal servitude.

Charles Mellor for appellant (under sect. 10 of the Criminal Appeal Act), who was present. Appellant had engaged the prosecutrix as a day girl to come to his house to assist in the work during the absence of his wife. Appellant's son, aged thirteen, was called by the prosecution to prove that the prosecutrix made a complaint to him on the morning when the offence was committed, November 24th, 1908, and that he repeated it to the appellant. After some discussion the learned judge allowed this boy to be treated as a hostile witness, inasmuch as a statement was brought to the notice of the judge, which was said to have been made by the boy to a sergeant and a constable who called at the appellant's house, and had an interview with the boy. His evidence contradicted this statement, and counsel for the prosecution was allowed to treat the witness as hostile. The learned judge should first have been made familiar with the circumstances in which the statement was obtained. The two constables interviewed the boy alone, and though the boy signed a paper, he said that he did not know what it contained, as it was folded and merely handed to him for his signature. The defence was that appellant was never alone with the girl when the alleged offence was committed. That was given in evidence by the boy. The corroborative evidence against appellant consisted of the complaint made by the prosecutrix to her aunt, and the doctor's evidence. No doubt the girl had been ravished, but appellant was not the

(*a*) See p. 86, above.

man. It was a question of identity, and in any case the evidence disclosed only supported a case of carnal knowledge of a girl under sixteen. He referred to *Rice* v. *Howard* (see p. 87).

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Coutts Trotter, for the Crown, was not called on.

Darling J.: As far as the suggestion made against the police officers is concerned, the learned judge told the jury that if they believed the boy's story, they might disregard the evidence given by the constables. The fact that the boy was allowed to be treated as a hostile witness really made no difference to the case. But the statement made to the officer who arrested appellant was sufficient to convict him. Appellant all along denied having anything to do with the prosecutrix, and yet, when the officer was taking him to the station appellant said, "I only put my arms round her neck and kissed her."

Appellant gave an explanation as to that statement which his counsel says is so incredible that it must be true. There is ample evidence to support the conviction, and there can be no interference with the sentence.

Appeal dismissed.

JOHN VERNEY.

John Verney

False confession of crime.

Under sect. 3 (*b*) *of the Criminal Appeal Act*, 1907, *a person who has pleaded guilty may appeal against conviction.*

This was an appeal against conviction, leave having been granted by Mr. Justice Pickford.

Appellant was indicted for sacrilege, before Mr. Commissioner Rentoul, at the Central Criminal Court, on March 3rd, 1909. He pleaded guilty, and was sentenced to twelve months' imprisonment with hard labour. Except his own confession, there was no evidence against him.

Symmons for the appellant (under sect. 10 of the Criminal Appeal Act), who was present. Leave to call evidence was desired

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to prove that appellant was elsewhere at the date of the offence. Appellant pleaded guilty, but under sect. 3 (b) of the Criminal Appeal Act, 1907, he had a right to appeal.

The Lord Chief Justice referred to *Walter Lucas*, (1908) 1 Cr. App. R. 61.

Turrell, for the Crown: It appeared that appellant was in prison on February 8th, 1909, the date of the offence. On coming out of prison he went to the Salvation Army, who would not assist him for more than two days; then he wandered into a police court, where he heard two men being charged with sacrilege. On February 17th appellant, having nowhere to go, gave himself up upon the charge which he had heard preferred against the two men. He was consequently tried along with them, although, when his confession was read over to them, the two men denied all knowledge of appellant.

Symmons: There were other offences charged against the men, but it could be proved that appellant was elsewhere—namely, in prison on February 8th, and on February 14th and 15th in the Salvation Army Shelter at Blackfriars.

Leave was granted to call witnesses.

Arthur Flayle and *John Cooper*, of the Salvation Army, proved that appellant was in Army Shelters on the last two dates.

Counsel referred to Best's Law of Evidence, s. 563 (10th ed.), and *Brown* (1889), 24 Q. B. D. 357; 59 L. J. M. C. 47; 54 J. P. 408; 61 L. T. 594; 38 W. R. 95; 16 Cox C. C. 715; C. C. R.

The Lord Chief Justice: Appellant is discharged.

Conviction quashed.

JAMES CURLEY (*a*).

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James Curley.

Causing death through flight or retreat from a reasonable apprehension of serious violence is at least manslaughter.

Appellant was indicted for murder, and was found guilty of manslaughter.

Roome for the appellant (under sect. 10 of the Criminal Appeal Act), who was present. Appellant lived with a woman named Watts in a flat. On February 4th, 1909, he left work early, went "on the drink," and returned home with a man named Adams. The woman Watts went out for more beer, and when Adams left them appellant and Watts were on quite friendly terms. Later on a neighbour named Mrs. Taylor heard the noise of a quarrel. According to her evidence, it sounded as though Watts were shut in the bedroom, and knocking was heard, and cries of "Let me out," "Murder," "Police." Appellant was heard to go to the room, when apparently the sash of the window was thrown up, the noise of which was followed by calls from Watts for help, and then the sound of a falling body. It appeared that Watts had jumped through or fallen out of the window, which was thirty feet from the ground. There had been a misdirection, inasmuch as the learned judge had not told the jury that in order to find appellant guilty they must be of the opinion that Watts was put in fear of death by the action of appellant. He referred to *Evans* (1812), 3 Russ. on Crimes (6th ed.), p. 12.

Bodkin and *Travers Humphreys*, for the Crown, were not called on.

Jelf J.: The statement made by appellant shewed that the passing from one room to another and the noise of knocking were all before the event which led up to the woman's jumping out of the window, and her subsequent death. Appellant told the officer, "I ran at her to hit her. I didn't quite touch her. Out she

(*a*) See p. 96, above.

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jumped." On that statement a verdict of murder might well have been returned, but it was mercifully reduced to one of manslaughter. The jumping out of the window was contributed to by appellant's unlawful act. It is said that the learned judge misdirected the jury. On the contrary, all the points were put for the defence most carefully in a case which might well have been one of murder.

Appeal dismissed.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE CHANNELL, AND MR. JUSTICE JELF.

THOMAS WILLIAM SIMPSON.

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Thomas William Simpson.

Leave to appeal granted on a question of identity.

This was an application for leave to appeal against conviction, the application having been referred to the full Court by Mr. Justice Channell, who had granted an application for extension of time.

Appellant was convicted of robbery with violence, before Mr. Justice Sutton at Birmingham Assizes on December 7th, 1908, and sentenced to five years' penal servitude.

Wrottesley for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. The prosecutor was walking along Occupation Street, Birmingham, alone at about twelve o'clock midnight, when he received a blow on the head from behind. He heard and saw no one, and remembered nothing until he recovered consciousness in the hospital. A witness named Davis was going along Suffolk Street at the time, and so had to pass the top of Occupation Street. As he looked down Occupation Street he saw a group of four men, one lying on the ground, two bending over him, and the fourth standing with his back turned to the witness. Davis spoke to the men, and then went on up Suffolk Street for assistance. He returned shortly afterwards with Hughes, a police constable, and saw three men turn out of Occupation Street and go down Suffolk Street. Davis followed the men while the constable went to look after the prosecutor. The tallest of the three men was on the right, and he, turning down Gough Street, disappeared, but the capture of the other two was effected. The applicant came to assist the constable when attention was being paid to the prosecutor's injuries before being removed to the hospital. He did, in fact, help to support the prosecutor, and came from his house, which was close by, for that purpose. It was not until after the prosecutor had been taken to the hospital that the

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applicant was arrested. The only evidence against the applicant was the evidence of Davis and the constable Hughes, who said that he *was* the tallest of the three men whom they saw coming out of Occupation Street. Both admitted that they had never seen either of the three men before and failed to identify appellant when he was rendering assistance to the prosecutor.

Leave to appeal granted.

Robert F. Thompson.

ROBERT F. THOMPSON.

Severity of sentence—Powers of the Home Secretary under 8 *Edw.* 7, *c.* 59 (*Prevention of Crime Act*, 1908).

This was an appeal from an order of the Lord Chief Justice refusing leave to appeal against sentence

Appellant was indicted for breaking and entering before the Chairman of the County of London Sessions, on March 9th.

He pleaded guilty, and was sentenced to four years' penal servitude.

Appellant, who appeared in person, said that he pleaded guilty because, in view of his many previous convictions, he thought it useless to do otherwise. He had never had a chance to earn an honest livelihood.

Darling J. : Appellant, by his conviction, forfeited a licence which he held, and will now have to serve three years' penal servitude, part of an old sentence, in addition to the four years' penal servitude passed upon him in respect of the housebreaking charge. He is forty-six years of age, but has served a great part of that time in prison, having been repeatedly convicted since 1881. He says that he has never had a chance to earn an honest livelihood, a statement which the Court thinks is probably true. The sentence, however, must stand, as it is the best which could have been passed in the appellant's own interests. There are additional reasons for taking this course, inasmuch as the appellant will receive the benefit of the new Prevention of Crime Act, 1908, which, by sect. 13, provides for a prisoner, under a system of preventive detention, being employed on work which will give him

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a chance of earning an honest livelihood when he is discharged. The Act does not, however, come into force until August 1st, 1909, and although after that date this Court will have power to order preventive detention, at present resort must be had to sect. 12 of the Act, which provides that where a person has been sentenced, either before or after the passing of the Act, to penal servitude for a term of five years or upwards, the Secretary of State, if he thinks such person to be a habitual criminal, may, if he thinks fit, at any time after three years of the sentence have expired, commute the whole, or any part of the residue of the sentence, to a sentence of preventive detention, such sentence not to exceed the term of penal servitude originally passed. The present case appears to us to be one in which the Home Secretary, when the time comes, might exercise his discretion.

Application dismissed.

FRANK RIDLEY.

Frank Ridley

In all applications for bail, after conviction, notice ought to be given to the prosecution.

This was an appeal from an order of Mr. Justice Jelf refusing bail.

Appellant was convicted of forgery, before Mr. Justice Phillimore at the Central Criminal Court on March 18th, 1909, and sentenced to four years' penal servitude.

Morle for appellant, who was not present. Appellant was indicted with two others for forgery. He had been charged with ante-dating certain deeds of settlement in order to enable another defendant to defeat his creditors and the trustee in bankruptcy. The defence was that appellant had no idea that the person who executed the deeds was in financial difficulties, and that the deeds in question were only duplicate deeds, the originals having been lost. The defence was a substantial one, and necessitated preparation. Bail ought to be allowed pending appeal.

Muir, for the Crown: After conviction bail should not be granted, except in extreme cases. In any event, if application for bail

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were made, notice to be present at the application should be given to the prosecution. On applications for bail before the trial took place the prosecution was always heard, and that was a time when the accused was presumed to be innocent. It was important that the Court of Criminal Appeal, in considering applications for bail, should be in possession of facts which very often were known only to the prosecution. Sects. 14 (2) and 17 of the Criminal Appeal Act, 1907, and Rule 29 of the Criminal Appeal Rules, 1908, though they referred to the granting of bail, did not deal with the right of the prosecution to be present at such application, and a ruling upon the point was desired.

Darling J.: We see no reason why bail should be granted in this case. As to the point raised by Mr. Muir, there is no rule under the Act that notice should be given to the prosecution on applications for bail being made. It may be necessary to provide for it, but there being no rule we cannot bind the Court by saying that the prosecution ought to be present. But we think it desirable that a judge, or the Court, in the exercise of his or their discretion, should direct that such notice should be given, especially in cases in which the Director of Public Prosecutions is concerned, and that where such notice has not been given applications for bail should be refused.

Solicitor for appellant: *Clarke & Co.*

Application refused.

James Mack.

JAMES MACK.

The Court is not disposed to hear witnesses on the plea that defendant could not afford to call them at the trial, as, in a proper case, the police will pay their expenses.

This was an application for leave to appeal against conviction, the application having been referred to the full Court by Mr. Justice Channell.

Appellant was convicted of obtaining money by false pretences, before Mr. Justice Bucknill at Winchester, on March 18th, and sentenced to five years' penal servitude.

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Thomas for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. Appellant represented that he was a second-hand furniture dealer, and in advertisements in the *Feathered World* and such papers, said that he had poultry which he was prepared to send to customers on receipt of postal orders. In one advertisement he stated that he had twenty-five black Minorca pullets, for which he asked 3*l.* 8*s.* An answer was received from an intending purchaser, who asked if he might have one or two to see. Appellant said he could not break the lot, and that the twenty-five would be sent on receipt of the money. The money was received and the pullets sent. They were, however, sent back as not being up to description, and a return of the money was demanded. Appellant offered a piano or a sewing machine instead. If the appellant had described himself as a fowl dealer instead of a furniture dealer there would have been no false pretence, because appellant had said that when he offered the twenty-five Minorca fowls, he was in a position to send them. It was desired to call further evidence as to the genuineness of the transactions which appellant had negotiated. There had been no money to pay the expenses of these witnesses at the trial.

[Channell J.: The solicitor no doubt wrote to the witnesses; he was instructed three days before the trial.

Jelf J.: If the solicitor knew that certain evidence was necessary he would be able to tell the witnesses that their expenses would be paid.

Darling J.: If his witnesses do not come, then naturally the prisoner stands a greater chance of being convicted. If he appeals and says he could not get witnesses because he could not afford them, it follows that trial by judges will be substituted for trial by jury.]

There ought to have been evidence of a false pretence. The officer who went to examine the house where appellant carried on his business admitted that he never examined the premises.

Channell J.: There was ample evidence in this case to support the conviction. There is no reason to think that anything the

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learned judge may have said with regard to the possibility of getting witnesses influenced the jury in any way. Appellant admitted that there was a notice in his cell about prisoners being allowed to call evidence. As a matter of practice, if the evidence is material, money is advanced by the police for the purpose of getting the necessary witnesses to Court. The only witness now desired to be called is appellant's step-son, but no mention of him was ever made to the solicitor before the trial. We think, and it has been laid down, that it is not intended by the Act that there should be a re-trial of a case which has already been tested by a jury. In this case the appellant advertised that he was a business man, and in the correspondence that followed he used paper with headings that described him as a furniture dealer. This led people to regard him as a respectable tradesman. As a matter of fact, the place he occupied was an ordinary house with three rooms, and a notice outside that it was shortly to be opened as a bird shop. There is not any suggestion that the fresh evidence can dispose of that. Appellant has been convicted before of the same offence, and having that in view we think there has been no miscarriage of justice.

Application refused.

Henry Everest.

HENRY EVEREST.

Sufficiency of corroboration of an accomplice.

This was an appeal from an order of Mr. Justice Jelf refusing leave to appeal against conviction.

Appellant was convicted of larceny, before the Deputy-Chairman at the County of London Sessions on March 23rd, 1909, and sentenced to nine months' imprisonment with hard labour.

Eustace Fulton for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. Appellant was convicted of being concerned with others in stealing meat from a van. The carman of the van in question was convicted of the larceny on March 14th, but passing of sentence was postponed in order that he might give evidence against others who were suspected of being

implicated. Appellant and another man were eventually charged with conspiring with the carman to commit the larceny, and the carman gave evidence that the robbery was arranged between them. The only other evidence was the evidence of a man named Green, who said that when he was in a public-house he saw the carman and the other accused person together. He then saw appellant come in, have a drink, and heard him say "Good morning" to the other men, and saw him go out again. A caution was given to the jury about the carman's evidence, but the caution was not sufficient. In any case, the evidence against appellant was perfectly consistent with his innocence.

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Henry Everest.

Leave to appeal allowed.

JOHN WILLIAM BALDWIN.

John William Baldwin.

Severity of sentence not affected by sentence on co-prisoner.

This was an appeal against sentence, leave having been granted by the Lord Chief Justice.

Appellant was convicted of housebreaking and stealing, before the Chairman at the West Riding Quarter Sessions on January 8th, 1909, and sentenced to seven years' penal servitude.

Cuthbertson for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. Appellant was convicted of having committed the offence in company with a man named Thomas. He gave evidence that Thomas was the ringleader. There was communication between the two men before the offence was committed, but that was only a letter from appellant to Thomas containing money which was owing. Thomas was much older than appellant, and considering the records of the two men, some difference should have been made between their sentences, whereas both of them were sentenced to seven years' penal servitude.

Bramley, for the Crown: Appellant worked in a mine, and was thirty-one years old. He was fined 1*l.* in 1904 for stealing fowls, and in 1905 he was sentenced to fifteen months' imprisonment with hard labour on a charge of passing counterfeit coin.

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Thomas had served two periods of seven years' penal servitude for shop-breaking. There was evidence that appellant was the instigator of the crime.

JELF J.: The appellant and a man named Thomas were indicted for breaking into a hotel. Thomas pleaded guilty. The only question is whether the sentence in the appellant's case is too severe. We are asked to compare the sentences, but it is obvious that the judges who try these cases are better able to judge of comparative guilt. Both men seem to have taken part in this carefully planned robbery, and they have both been convicted before. The difference in the men's ages and records is urged upon us, but having regard to all the circumstances of the case, we think the appeal must be dismissed.

Appeal dismissed.

Charles Parker.

CHARLES PARKER.

Slight misstatement in summing up not a ground for quashing a conviction.

This was an appeal against conviction, leave having been granted by the Lord Chief Justice.

Appellant was convicted of stealing from the person, before the Chairman at the County of London Sessions on March 16th, 1909, and sentenced to fifteen months' imprisonment with hard labour.

Pearson for the appellant (under sect. 10 of the Criminal Appeal Act), who was present. Appellant, with another man named Jackson, was arrested at a railway terminus and charged with stealing a book from a lady's hand-bag. Both men were mingling with a crowd, but a police officer gave evidence as to seeing the men near the lady, and afterwards the book was found lying on the ground where they had been standing. The lady discovered her loss as she was getting into a train, her attention being attracted by finding her bag open. The officer arrested both men at once, and according to his evidence there was no doubt that they were the men who had been crowding round the lady. The learned Chairman told the jury that they could only reject the

constable's evidence if they thought he was committing perjury. That was an extreme statement.

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Wilkinson, for the Crown, was not called on.

CHANNELL J.: The fact that a judge makes some slight misstatement to the jury is no ground for setting aside the verdict. Appellant made no remark when arrested, and it is curious that if he were an innocent man he should not protest his innocence. I can see no possibility of a mistake having been made as to the man.

Appeal dismissed.

SAMUEL GEORGE WATKINS.

Samuel George Watkins

Sect. 4 (2) *of the Criminal Appeal Act*, 1907—*Point of law rightly taken by appellant, but "no substantial miscarriage of justice."*

This was an appeal against conviction, and an appeal against an order of Mr. Justice Jelf refusing leave to appeal against sentence.

Appellant was convicted of forging and uttering, before Mr. Justice Ridley at Exeter Assizes on March 12th, 1909, and sentenced to five years' penal servitude.

H. C. Davenport for the appellant, who was not present. Appellant was an agent for the Western Provident Association. In July, 1908, an amount of 135*l.* 17*s.* 6*d.* became due to a policyholder of the association named Rogers. On July 29th a cheque for that amount was sent to appellant to pay over to Rogers. The evidence for the prosecution was that appellant forged the indorsement on the cheque, cashed it, and went to South Africa with the proceeds. The appellant gave evidence that having received the cheque from the association, he went to see Rogers at Newton Abbot, that Rogers endorsed the cheque and asked appellant to give him cash. Thereupon appellant, as was his custom, paid the cheque in to his own account, and afterwards drew the money out, intending to give it to Rogers, but could not find him. He then went to South Africa. There was evidence that appellant went to South Africa for his health.

Hicks, for the Crown, was not called on.

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DARLING J.: As far as the sentence is concerned, the Court is now of opinion that there was no ground for granting leave to appeal. The offence was deliberately committed, requiring great ingenuity, and it involved a large sum of money. We are asked to say that the learned judge was wrong in not allowing further cross-examination of a witness, the cross-examination being for the purpose of discrediting another witness on other matters when he came to give evidence. This gave rise to a discussion between the learned judge and counsel for the defence (not the gentleman who appears to-day), the terms of which we frankly say we regret. But we have to look at the statute, and that gives us power to intervene only if we think there was a miscarriage of justice, for there is a proviso under which, even assuming the appeal might be decided in the appellant's favour, we can dismiss the appeal if we think that no miscarriage of justice has in fact taken place. We think that there has been no such miscarriage of justice.

Appeal dismissed.

Solicitors for the appellant: *Dunn and Baker*, Exeter.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE BRAY, AND MR. JUSTICE A. T. LAWRENCE.

WILLIAM JOSEPH FOY.

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William Joseph Foy.

On an indictment for murder the judge is entitled to withdraw a defence of manslaughter from the jury.

This was an application for leave to appeal against a conviction for murder, before Bray J. at the Cardiff Winter Assizes, on March 31st, 1909. The deceased woman was a prostitute with whom the applicant had been living for some five days previously. The murder occurred on the night of December 23rd in the vicinity of certain disused kilns, whither the deceased, applicant, and another man and woman had gone. Some quarrel arose between applicant and deceased, and she left the kiln. He followed her, saying he would fetch her back, and it was alleged that she was pushed down a disused blast furnace some thirty or forty feet in depth by the applicant. The two witnesses, who were with the applicant and the woman not very long before the occurrence, were at one of the kilns about thirty yards off. The evidence rested mainly on the statements of the applicant himself. On his return to the kiln the applicant came up to the others and said he had "shot" the woman down the hole. He subsequently went and made the same statement to the police, saying, "I want you to lock me up," and on being asked why, he replied, "Murder. I have thrown Sloppy [her nickname] down a hole," adding that she had threatened to give him in charge for living on her prostitution. He led the police to the place, pointed out the hole, and said he had caught her up at a spot about sixteen yards distant from the hole and had dragged her up to it, and then thrown her down. There were marks on the ground corroborating this story.

R. Sutton for applicant (under sect. 10 of the Criminal Appeal Act), who was not present. It was consistent with the evidence that the woman was killed accidentally by the applicant in his struggle with her. Apart from the marks on the ground, the

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evidence for the Crown consisted of applicant's statements. Too much weight was given to applicant's statements at the time. They were rather confessions that he had been instrumental in causing her death than confessions of wilful murder. There was no evidence of any screams having been heard by the witnesses; this was extraordinary if she was dragged sixteen yards. The learned judge did not point that out to the jury.

[Bray J.: I was under the impression that the two witnesses had heard more than they said, but I did not say so to the jury.

A. T. Lawrence J.: I gathered the same impression from reading the evidence.]

The applicant in his evidence stated that the affair was an accident, and the learned judge only left it to the jury to say whether it was accident or wilful murder.

The learned judge withdrew the case of manslaughter from the jury. It is submitted that if the applicant had been doing something illegal, such as knocking the woman about, near the edge of the furnace, and in the struggle she had gone down it, it would be manslaughter. Taken as a whole the evidence was consistent with this view, and the question ought, therefore, to have been left to the jury.

[Darling J.: If he were doing an illegal act, and he had reason to think that she might go down the hole and be killed, according to the modern theory it would be murder.]

Darling J.: The evidence cannot be in any way attacked. On the applicant's own statements there can be no doubt that it was a case of intentional murder.

Application refused.

JOSEPH JAMES COOK.

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Joseph James Cook.

A jury is not bound to accept the exoneration of one prisoner by another.

Appeal from the order of Darling J. refusing leave to appeal against conviction, and application to call further evidence.

Applicant was convicted on March 26th, at the County of London Sessions, before the Chairman, of receiving certain stamps. He was tried with two others, one of whom, applicant's brother, was convicted of stealing the stamps. The applicant and his brother occupied the same room and the same bed. The stamps were brought to the lodgings by the brother, and at some period afterwards they went out together, when the brother went into a shop in order to dispose of the stamps, while the applicant remained outside. One of the stamps, marked six cents, was found in applicant's pocket when he was arrested. Applicant and his brother were both sentenced to twelve months' imprisonment with hard labour. There had been one previous conviction against applicant.

W. H. Sands (under sect. 10 of the Criminal Appeal Act) for applicant, who was not present. There was no satisfactory evidence of guilty knowledge. On the other hand, applicant gave a satisfactory explanation of the circumstances. The Chairman did not discriminate to the jury the case of applicant from that of his brother. Applicant's evidence was that the stamps were brought by the brother to the lodgings without his knowledge, and that they remained there without his consent and against his will. The brother's evidence at the trial was practically a confession of his guilt.

[A. T. Lawrence J.: The property was placed on their joint bed. How can anyone say who was the receiver?]

There was the evidence of the brother at the trial, in which he took all the guilt to himself.

[A. T. Lawrence J.: But that evidence was not withdrawn from the jury.]

Applicant asks also for leave to appeal against the sentence, which is the same for both brothers, though, according to the police evidence, applicant had been honestly looking for work.

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[BRAY J.: Was applicant the elder?]

Yes.

BRAY J.: There was here the evidence that the property was taken to the lodgings jointly occupied by the two brothers, and that it was placed upon the bed which they also jointly occupied, where it remained for some time. They afterwards went out together, when the brother went into a shop in order to dispose of the property, while the applicant remained outside. Thus there is evidence of a joint dealing with the property. Moreover, some portion of it—one of the stamps—was found in applicant's pocket.

Application refused.

William Charles Morton Bradley.

WILLIAM CHARLES MORTON BRADLEY.

Where evidence for the defence as to the state of a prisoner's mind can be called at the trial, the Court will not hear that evidence unless, perhaps, insanity is alleged.

Appellant was convicted on March 19th, before Bucknill J. at the Winchester Assizes, of attempted murder, and was sentenced to ten years' penal servitude. He had served twenty-one years in the Artillery, where he had had a most excellent record, and his name had been sent in for a commission at the time of the occurrence. Some few years before he and a fellow artilleryman named King had been very intimate at Aldershot, and the families of each were on intimate terms. At that time King had had some suspicion that there had been improper relations between his wife and appellant. King left the service some time afterwards, and took over a public-house at Ryde. King's suspicions as to these relations having taken place were re-aroused at the end of the year 1907, and he thereupon commenced to send to the appellant letters threatening to expose him to the military authorities to prevent his promotion to a commission, in which letters he also denounced appellant in the strongest language, and threatened to murder him. Appellant appeared to be much upset and unnerved by these letters, and he proceeded in consequence to carry a loaded revolver about him. In January appellant went down to Ryde for the purpose of obtaining a warrant against

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King for sending these letters. The warrant was granted, and King was arrested about 5 p.m. the same day. Appellant had purposed returning home the same day, but had been advised to await the hearing before the justices on the following morning. About 6 p.m. he was passing by King's public-house, and he expressed an intention of turning in, at his (Bradley's) wife's request, to ask King's wife to write a letter denying the allegation of adultery between him and her. King's wife was not in at the time, so that appellant went out and returned a little later. On entering the house on the second occasion he saw King's wife standing there and a man standing behind her. He drew out his revolver, and he shot King's wife in the abdomen. She stated that immediately after she had been shot she heard him say that he had had enough of the advertisements of the Crown Hotel (King's public-house) during the past fortnight. King and appellant were both tried at the Winchester Winter Assizes before the same jury, appellant's counsel appearing for the prosecution against King. Jelf J. had granted leave to appeal against conviction and sentence.

S. H. Emanuel for appellant, who was present. The defence was that there was no intent to shoot the woman. Appellant was in an extremely unnerved condition. He had once or twice before during the course of his career broken down, and has been obliged to give up work. At this time he was so upset by King's conduct, and all the consequences with which he was threatened, that he had quite lost self-control. When he entered the public-house and saw the man standing behind King's wife, for the moment he thought it was King, and he proceeded at once to draw out his revolver from his breast pocket in order to transfer it to his trousers pocket, as he was in such a condition of fear that King would take his life. In transferring it, having at the time no control over himself, the revolver went off. His condition at the time was quite abnormal.

[Darling J.: It would be impossible to say, having regard to what the rule as to insanity is, that he was insane, seeing all that he had recently done, laying an information, &c.]

It is desired to call evidence to shew that this revolver had previously, in other hands, gone off accidentally. (In reply to

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A. T. Lawrence J., counsel stated that, without definite knowledge, he believed that previous occasion had been some two or three weeks before.) It was shewn to the jury for the purpose of testing the trigger, but at that time it had been out of use for ten weeks, and had got stiffer. Appellant described to the jury how it had occurred.

[Bray J.: It is not want of oil. The spring is hard. The appellant did not suggest in his evidence that it was a light pull. Was the revolver cocked or uncocked?]

Appellant was not asked that. It might have got cocked while he was transferring it from one pocket to the other, for he stated that it caught in his coat lining. One of the jury, just before they retired, asked the question, and Bucknill J. replied to him that no one but a madman or a fool would carry it cocked.

[Darling J.: The evidence as to its having gone off accidentally before might have been called at the trial. There is the evidence of its not being now a light pull. We cannot give a new trial. A stronger motive for the crime could not have been adduced. He never said that it was an accident. There is Mrs. King's evidence as to what she heard him say immediately after the shot, and there is also evidence that he kept muttering about the Crown Hotel having ruined him, and that he had said, "What made me do it? I had no intention of doing it when I came to Ryde this morning."]

I have a copy of his instructions, given long before the trial, to the effect that it was an accident.

[Bray J.: Ought we to look at that?]

I do not ask that. It is urged, moreover, that the jury, being the same who had already tried and acquitted King, were influenced by the charge of immorality.

[Darling J.: Did you apply for a fresh jury?]

No. My friend Mr. Temple Cooke and I went before the

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learned judge to discuss the matter as to which case should come first, and we agreed that it was better to take King's case first. King was acquitted on the ground that he did not know what he was doing at the time he wrote the letters. Bucknill J. directed the jury in his summing-up that if at the time he wrote he was in such a distracted condition of mind in consequence of the belief that his wife had been seduced as not to know what he was doing, he would not be guilty, as there would be an absence of intent and of evil mind.

Counsel finally addressed the Court in mitigation of sentence. *Temple Cooke*, for the Crown, was not called on.

Darling J.: The appellant was indicted for wounding with intent to murder. The case is a very painful one. For some time ill-feeling had existed between him and King. King undoubtedly charged the appellant with having seduced his wife, and had written him many threatening letters of a violent kind. Within a few hours of King's arrest the appellant went to King's house and shot his wife. He was very ably defended on his trial, and the counsel who defended him prosecuted King. King's defence was that, short of insanity, he had had no intention of doing the things which he threatened. The jury were well instructed as to the law in cases where intent is essential, and, in an extreme case, they took the view that intent was absent. The same defence was put forward on behalf of the appellant, and it was urged that he merely snatched the revolver from one pocket to another in order to be ready for King, whom he believed to be present. The defence, at the best, was one not very likely to be accepted. It was obvious that the appellant would have a strong motive for a violent act towards King or to someone for whom King might have affection. Several expressions were used by the appellant at the time which go to show that the act was intentional. Immediately afterwards he said, "Whatever made me do it! I didn't intend to do it when I came to Ryde this morning!" It is not pretended that he said it was an accident. He asks now for leave to call evidence that the revolver had once before gone off by accident. Such evidence would practically prove nothing. The jury had the revolver and they took it with them when they retired. It was a pure question of fact. There is, therefore, no ground for revision upon that point. It is further

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desired to call evidence as to the breakdown in appellant's health to shew that, at the time, he would, most probably, not know what he was doing, and he might have let the revolver go off accidentally All this evidence might have been called at the trial, though at that time we are told that the facts were not known to the defence. If the evidence desired to be called were evidence to prove insanity very different considerations would arise. But that is not sought. We cannot see that the evidence suggested is so closely connected with the defence as to warrant us in allowing it. We are satisfied that the shooting was not accidental.

The sentence is severe. The judge gave his reasons for it. He was fully aware of the consequences which it would necessarily entail to the appellant in his profession and in every way. The judge would have had no right to gratify his own feelings by dealing with the appellant in a way that his own feelings might make him wish to do. Nor should we have any right to do so.

Appeal dismissed.

Thomas William Simpson.

THOMAS WILLIAM SIMPSON (*a*).

When the defence is mistaken identity, if it is put properly to the jury the Court will not set the verdict aside.

Wrottesley for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present.

On the evening of October 3rd the prosecutor was knocked down and robbed and left lying in the street unconscious at a spot close to Simpson's house. Three men (two of whom had been convicted with Simpson) were seen by a witness (Davis) standing over the prosecutor. As the men came out of the street into Suffolk Street they were seen by P. C. Hughes and a man named Davis. Hughes went to the injured man, and directed Davis to follow the men. Two went down Suffolk Street, and Simpson crossed over into Gough Street. Just as Hughes went to the injured man Detective Rathbone chanced to come up the street. He immediately followed Davis and the two men

(*a*) See p. 111, above.

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down the street and arrested them, and with the help of P. C. Barker brought them to where Hughes was with the injured man. Hughes immediately identified them. Rathbone, Hughes, and witness Davis then took the two men to the police station, leaving P. C. Barker in charge of the man, who was recovering consciousness. After they had all departed, Simpson came upon the scene and offered to assist Barker to put the man on the ambulance. Shortly after this, the witness Davis, together with Detectives Rathbone and Stickland, returned, and as soon as Davis saw Simpson he pointed him out to Rathbone and said, "That is the other one." He was then arrested, and when charged said, "What time do you say it was?"

The opportunity of identification was insufficient. It was momentary, and the light was admittedly bad. Further, the actual identification was belated, at any rate, by one of the witnesses, and it lacked spontaneity. Evidence was given at the trial that appellant was a friend of Downes, one of the two other prisoners. This prejudiced his case. As a matter of fact he was only an acquaintance of his through the fact that Downes was courting appellant's daughter.

T. Norris-Foster, for the Crown. The prisoners came under the strong light of a lamp. They had been warned by a witness (called by the prisoners) that there was a constable at the bottom of the street.

[Bray J.: The witness referred to said she could not identify any of the three prisoners.]

We say these three men were the three prisoners. She stated that the three men went out into Suffolk Street, and so corroborated the witnesses Davis and Hughes. Again, all the prisoners denied knowing one another, but the police proved that they were all acquaintances. Simpson denied that Downes was a friend of his daughter, but it was part of the police evidence, and the jury believed it. Downes himself at the lock-up said that he had never seen appellant before in his life, and appellant said he did not know Downes.

[Darling J.: Why did not Hughes, on his return to Occupation Street, arrest Simpson?]

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Because Simpson was not there. Hughes was asked that question by Simpson's counsel, and his answer was: "If he had been there I should have arrested him."

(He was stopped by the Court.)

Wrottesley, in reply.

Darling J.: The case against appellant is not very strong. It is remarkable that very soon after the robbery he was helping police-constable Barker in attending to the prosecutor. It was a very astute thing to do. When Davis and the constable returned they identified appellant. All the difficulties as to identification were put to the jury. The judge said that he was satisfied with the verdict. The jury are the judges of fact. The Act was never meant to substitute another form of trial for trial by jury. The case was not a strong one. It would have been open to the jury to acquit, and no one could have called the verdict perverse. But the verdict which the jury have given must stand.

Appeal dismissed. Sentence to run from date of conviction.

Henry Everest.

HENRY EVEREST (*a*).

Corroboration of an accomplice's evidence must be in a material particular.

Eustace Fulton for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present, made application for leave to call fresh evidence, but this was refused. Appellant, according to the evidence of a witness named Green, on the morning of the theft went into a public-house, where were two men named Frost, the carman, and Smith. Appellant passed some ordinary remark to Smith, had a drink, and went out. About an hour later the van was driven away by Frost and Smith. Frost pleaded guilty at the previous Sessions to stealing the van-load of meat, but sentence was postponed in order that he might have an opportunity of giving evidence. On an incriminating statement by him Smith and appellant were arrested, and Smith pleaded guilty. Frost was called by the prosecution on the trial and gave evidence that the larceny was planned between appellant, Smith and himself in a

(*a*) See p. 116, above.

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public-house on the morning of the theft. In corroboration Green was called to prove that he saw the three men together in the tavern on that morning. There was no corroboration such as is necessary of the evidence of the accomplice Frost. The only independent evidence was that of Green, and his evidence did not afford the necessary corroboration, which must be corroboration going to the offence itself. (*Farler* (1837), 8 C. & P. 106.) All that Green's evidence amounted to was that the three men used the same public-house that morning.

[Darling J.: Frost said that appellant had told him to go (as part of the plot) to a certain police-station to complain of the loss of the van, and not to another.]

The fact that Frost did go to the one, and not to the other, was mentioned by the judge in his summing-up to the jury as being corroboration. But Frost might have done that of his own accord. Moreover, the fact that something stated by Frost has been proved by independent evidence to be true does not of itself amount to corroboration.

[Bray J.: The vice of the summing-up seems to be that it mixes up the matter of corroboration without pointing out what was really such.]

Purcell, for the Crown: Frost was tempted twice by the appellant.

[Darling J.: Saying that he was tempted merely amounts to this—that Frost committed a crime.

Bray J.: The appellant did not speak to Frost in the public house, but only to Smith. Frost's evidence of the conversation there conflicts with that of Green.]

The arrangement for the stealing would not be made in the presence of a stranger. Further, the jury heard Smith, against whom the same evidence was given as that which was given against the appellant, plead guilty to the offence.

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[A. T. Lawrence J.: The fact that Frost told a true story against the one would not make it true against the other.]

The jury were also able to observe Frost's demeanour and manner in the witness-box.

[Darling J.: That cannot be corroboration.

A. T. Lawrence J.: You would be making demeanour a substitute for corroboration.]

Darling J.: This is an appeal on the ground that there was no proper evidence on which to convict. The rule has long been established that the judge should tell the jury to acquit the prisoner if the only evidence against him is that of an accomplice, unless that evidence is corroborated in some particular which goes to implicate the accused. It is not sufficient that there should be corroboration in some particular which does not touch the prisoner. Suppose an accomplice to say that it was a black pig that had been stolen, and that it had been stolen on a Wednesday. To call a witness to prove that these facts were true would only be corroboration of the story of the accomplice, but not of the guilt of the prisoner. The only suggestion here is, that Frost and Smith were in the public-house, and that Everest came in and said "Good morning" to Smith. What could be more likely? How is that corroboration of stealing? It is put by the Deputy-Chairman to the jury as being such. The other suggested corroboration is, that a witness saw a van and pair of horses unattended in a street between 11 and 12 a.m., and that the prosecutor identified the van as his. The Deputy-Chairman said that that was proof that the van had been taken away. But that was not corroboration shewing the guilt of the appellant. The Deputy-Chairman should have told the jury that there was no sufficient corroboration of the sort required by Lord Abinger in *Farler*. The appeal must be allowed.

Conviction quashed.

FREDERICK CHARLES DAVIS AND FRANK RIDLEY (*a*).

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An accurate copy of a genuine document may be a forgery if uttered or manufactured with intent to defraud.

Severity of sentence.

Appeals against conviction on points of law, and applications for a leave to appeal against conviction on the facts and against sentences (the latter referred by Jelf J.). Both appellants were present.

Appellants were convicted after a trial lasting seven days (50 C. C. C. Sess. Paps. 816), on March 18th, 1909, at the Central Criminal Court before Phillimore J. of forging and uttering a certain deed, and sentenced, the former to five and the latter to four years' penal servitude. Davis was a builder and Ridley was a solicitor. The deed alleged to have been forged was one purporting to have been executed by Davis on July 21st, 1903 (but in fact executed in January, 1908), settling certain house property at Bromley on his children, and to have been attested by Ridley. There were five other deeds to a similar effect, similarly executed and attested, one bearing a date of the year 1901 and four that of 1905, all of which were likewise alleged to be forgeries and were given in evidence at the trial by the prosecution. In 1905 Davis brought an action against the Bromley Corporation and, in May, 1907, judgment was given against him with costs. He appealed, but the appeal was, on October 17th, 1907, dismissed with costs, with the result that at that date he was indebted to the Corporation in some £319 by way of costs. He was served with a bankruptcy notice on November 11th, 1907, by the Corporation; a petition was presented on November 27th, and a receiving order was made on January 28th, 1908.

On February 7th, 1908, judgment was given against Davis in an action which had been brought against him and one Forshaw by the Woolwich Equitable Building Society. Ridley at first acted as solicitor for Forshaw alone in that action, but shortly before Davis's appeal on April 3rd, 1908, he instructed Ridley to act for him in that appeal, and he did so act. Judgment was given against Davis on the ground of conspiracy and fraud, but the transactions and the deeds involved in that action were totally distinct from those in question in the criminal trial.

(*a*) See p. 113, above.

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The preliminary examination in Davis's bankruptcy proceedings took place on February 4th, 1908. The only deed referred to therein was that of the year 1901. On February 24th Davis filed his statement of affairs in which he referred to this deed. In April an offer of payment of 7*s.* 6*d.* in the £ was refused by the creditors. The only unsecured creditors were the Bromley Corporation and the Woolwich Equitable Society. Subsequently, Davis's brother, T. J. Davis, who was also a defendant at the (criminal) trial but was acquitted, offered, by an undertaking in writing dated July 27th, 1908, to pay these two creditors in full, but nothing came of this offer. On July 20th and 27th, 1908, T. J. Davis was privately examined in bankruptcy. T. J. Davis and Ridley were previously served with notices under sect. 27 of the Bankruptcy Act, 1883, to produce certain deeds of which T. J. Davis and one Nisbet were trustees. T. J. Davis thereupon, through Ridley, produced the six deeds alleged to be forgeries, and two others which were not attacked. About September, 1908, Ridley was questioned by one Burts, managing clerk to the solicitor for the Woolwich Society, whose suspicion had been aroused, by the fact of a deed bearing a stamp beyond the requisite value and other things, as to the dates on which these six deeds were in fact executed. At first he refused the information, giving as a reason for doing so, that T. J. Davis had undertaken to pay the two unsecured creditors. But on September 11th Ridley told Burts, as this had not been done, he would give him the desired information, and he, thereupon, stated to him that the six deeds produced had been executed in his presence between October, 1907, and February, 1908. The following day Ridley repeated this statement in an affidavit. In October, 1908, F. C. Davis was closely questioned at his public examination whether the six deeds alleged to be forgeries were executed on or about the dates which they bore, and he said that they were.

The appellants' story was that the original deeds had been executed and attested as purported in the duplicates, but that they had been lost, that under these circumstances they did not consider that there was anything wrong in making and putting forward the duplicates. It was disputed by the Crown on the other hand that there ever had been such original deeds. But it was admitted by the counsel of the appellant Davis on the appeal, that such a duplication, bearing as it did a false material date, though it might be a

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faithful copy of an original deed, if made with intent to defraud creditors, would, on the authority of *Ritson* (1869, L. R. 1 C. C. R. 200; 39 L. J. M. C. 10; 21 L. T. 437; 18 W. R. 73; 11 Cox C. C. 352), amount to a forgery. Criminal proceedings were begun in December, 1908, and the trial ought to have begun in February, 1909, but it had to be postponed owing to Davis's state of health. At the trial Ridley stated that these deeds had not been engrossed in his office, but that after he had prepared the drafts he had given them to Davis, who had taken them away to be engrossed, and that he had brought them back, when Ridley attested them.

J. J. Parfitt, K.C. (with him *G. W. H. Jones*) for the appellant Davis. This is an appeal on law, and we are also asking for leave to appeal on facts. The learned judge misdirected the jury as to the law upon the point of intent to defraud. He said to them: "Was it or was it not fraud to put forward the duplicates as being the original deeds, even if the others had been honestly lost? Such a making of duplicates was a thing unknown in the profession of the law. The defendants might have come forward and said that there had been deeds of settlement which had been lost—but then they might not have been believed . . . On the assumption that these deeds are honestly duplications, you will still have to consider whether the defendants were not guilty of forgery." The jury would understand from that direction that though the appellant executed these duplicates without any intent to defraud, yet he might be convicted of forgery. There must be a fraudulent intent at the time of forging.

[Darling J.: "Honestly" there may mean "actually." It is not necessary that there should be at the time of making a false document the intent of the particular fraud to which it is subsequently put.

Bray J.: If they had reproduced literally the old deeds, they might still have been convicted of forgery.

The Court drew attention to other parts of the learned judge's summing-up, in which he pointed out to the jury that there must be intent to defraud.]

The appellant also complains that the jury were informed in counsel's opening statement of the action by the Woolwich Society,

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and that judgment had been given against him therein on the ground of fraud and conspiracy. The deed in question in that action was totally different from any of these six deeds. The mention of this matter to the jury was wrong, and it prejudiced appellant's case. It was opened at the (criminal) trial by counsel for the prosecution from a statement contained in the preliminary examination of the appellant in bankruptcy, and it was put to the appellant in cross-examination.

[Bray J.: To mention the fact of the debt and the judgment would be all right; to mention the circumstances of it is a different matter.

Darling J.: Suppose it had been put in this way: "Did you hear Mr. Justice A. T. Lawrence, who tried the action against Davis and Forshaw, say so-and-so?" The ordinary rule would not apply to such a case, as the prisoner could not have got up and contradicted the judge.]

The judge also in his summing-up referred at length to this action.

[Darling J.: All this may have been let in by the fact of witnesses to character having been called. The appellants appear to have been warned by the judge. Ridley seems to have said that the charge was not a crime, but only a common law fraud.

Bray J.: Was no objection made to the reception of the evidence?]

No. The mischief was done in the opening.

G. W. H. Jones, who appeared for appellant at the trial, stated that at the trial he had not a copy of the preliminary examination and was not aware of its contents, and that the words "fraud and conspiracy" were uttered before he had time to object.

[Darling J.: Was no objection made because it was desired to wait for the Court of Criminal Appeal? That is a sort of thing that we shall have to be on our guard against.]

Objection was not made because counsel had not time to make it. The application for leave to appeal against conviction was based upon the fact that the verdict was unreasonable, and that the main

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evidence against Davis consisted of his answers at his public examination, when he was seriously ill. As to the application for leave to appeal against sentence, which had been referred by Mr. Justice Jelf, counsel urged the fact that Davis had previously borne a good character, and that his state of health was such as the result of an accident, that during the public examination in bankruptcy he was unable to give his mind to the questions put to him.

Kemp, K.C. (with him *Morle*) for the appellant Ridley. From the direction in the learned judge's summing-up, the jury may well have taken the view that these were honest reproductions, and yet found them guilty. One must assume, too, that the jury took the more favourable view.

[A. T. Lawrence J.: Do you say that if they had put forward the reproductions instead of the originals it would not have been forgery? If you manufacture a document with any fraudulent intent it is forgery.]

The mere fact that the deed put forward might prevent the creditors from having resort to the property comprised in it in order to obtain payment of their debt is not enough. It must be shewn that they had a right to resort to such property. They would have no right to do so if a deed, of which the one forming the subject of the charge was a duplication, had been executed on July 21st, 1903.

[Darling J.: Davis's creditors would have a right against his estate unless he could shew that the deeds had existed and had been lost. He might fail in that proof, and so anyone might have execution against his estate. The learned judge pointed out to the jury why the date was material—how the periods of two years and of ten years were important in view of the respective provisions of 46 & 47 Vict. c. 52, s. 47, the Bankruptcy Act, 1883.]

The date was only material so far as Davis was concerned. The prosecution is founded on *Ritson's Case* (above), but that case does not affect Ridley, as the "materiality" of the date in the deed depended on the date of the bankruptcy, and Ridley, when he attested the execution of the deed, had no knowledge of the judgment obtained by the Bromley Corporation or of the

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bankruptcy proceedings. He did not know of the bankruptcy proceedings till March 12th, 1908.

[A. T. Lawrence J.: Why did not Ridley tell Davis that the current dates would do?]

No particular reason can be alleged. Ridley did not have the deeds engrossed. The drafts from which they were prepared were handed to Davis.

[Darling J.: Ridley, a short time ago (*a*), applied for bail in order that he might obtain the evidence of solicitors to the effect that duplication was constantly done.]

The deed of December 18th, 1902, enabling Davis's trustees to sell, which is undisputedly a genuine one, was drawn up by Ridley.

[Darling J.: We do not think that we ought to allow this argument to go on. You are now arguing not that there was any miscarriage of justice but that the balance of evidence was in the appellant's favour. (The learned judge quoted sect. 4, sub-sect. 1 of the Criminal Appeal Act, 1907.)

Bray J.: If you are going to say that the conviction could not be supported by the evidence we must listen to you. But can you say so?

Darling J.: You are asked, as a leader at the Bar, if you can say that the conviction could not be supported?]

If the deed was honestly duplicated, that is, duplicated with an honest purpose—and it is consistent with the verdict of the jury that such was the case—there could be no intent to defraud.

Counsel then addressed the Court on the matter of sentence, urging that thitherto Ridley had borne a very good character in his profession.

Graham Campbell, for the Crown, was not called on.

Darling J.: The appellants were convicted of forging and uttering a deed with intent to defraud. It is sufficient if forging

(*a*) See p. 113, above.

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and uttering with an intent to defraud be proved without alleging an intent to defraud any particular person. It is said that between 1901 and 1905 various deeds were executed by Davis and witnessed by Ridley. Davis was involved in litigation in 1907, and became bankrupt. He desired to have documents to shew the Court that certain property was settled. He went to Ridley to prepare documents shewing that he had settled these houses. He arranged that Ridley should prepare the deeds. Ridley prepared drafts. The natural thing would have been that Ridley should have them engrossed, and Ridley would naturally have told Davis to keep the dates blank. Ridley's case is that he prepared the drafts, but did not have them engrossed in his own office, and Davis got them engrossed elsewhere. Davis had a lot of old parchments—unused agreements in common form—with stamps of certain years already on them. Ridley knew all this, as he told T. J. Davis. The deeds were not what they purported to be. They purported to be deeds executed and attested between 1901 and 1905. The last was, in fact, executed on January 28th, 1908. Was there evidence on which the jury could find that appellants forged and uttered these documents with intent to defraud? It is said that Ridley did not know who it was who was to be defrauded. The deeds being dated with the dates of years previous, and all these unnatural things having been done, we are asked to set aside the findings of the jury. It is necessary to speak strongly on this matter. We have allowed undue latitude to counsel. We do not sit here to revise verdicts, but only to set them aside if they are unreasonable, or if they cannot be supported having regard to the evidence. It is said that Phillimore J. gave a wrong direction on the point of "intent to defraud." But one part of his summing-up says expressly that there must be an intent to defraud. He says:—"It is forgery if a deed is drawn with intent to defraud. It is not success but intent which makes the fraud." The other part of his direction which made use of the word "honestly" could not wipe out the clear direction contained in the former part of his summing-up. But if it did so there is a proviso in the Criminal Appeal Act, sect. 4, sub-sect. 1, which covers the point. We do not say that the point might have been decided in favour of the appellants; we do not think so; but even if it might have been so decided we are of opinion that no substantial miscarriage of justice has occurred. It is stated that in opening the case counsel for the

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prosecution stated matters which were not evidence against the appellant Davis on his trial, but we have been unable to find the admission of any evidence that could be objected to; but if it were so, if counsel on the other side do not object, it is not obligatory on the judge to do so. When a prisoner is defended by counsel, and he chooses, for reasons of his own, to allow such evidence to be let in without objection, he cannot come here and ask to have the verdict revised on that ground.

It is argued that the Bromley Corporation and the Woolwich Equitable Building Society would not be defrauded, and that Ridley did not know of any likelihood of their being defrauded. All that is necessary is that there should be a possibility of their being defrauded. Davis and Ridley would have had to testify that these deeds had been made, and that the deeds and drafts had been lost. They probably would not have been believed, and Davis's case probably would have gone. Without such a scheme their object could not have succeeded.

As to the sentences, in order to interfere with them, we should be reasonably satisfied that the sentence is not just. We do not alter sentences as the Crown does. It was not alleged that Davis did not know what he was doing. If he is in such health that prison is injurious, it is possible for the Home Secretary and for the authorities to treat him accordingly, or the Home Secretary may release him. Davis has been guilty of conspiracy, forgery and perjury. Ridley is a solicitor, and solicitors are people privileged by holding positions under the Courts, and an exceptional standard of honour must be maintained by them. If he does not act up to that standard he must expect to be severely dealt with. He appeared here by counsel, and applied for bail in order to obtain expert evidence that this was an honest practice. He could have written and asked for solicitors to give such evidence. It is obvious that he must have a most inadequate notion of the duty of a solicitor. The Court is of opinion that the sentences ought not to be disturbed.

Appeals dismissed. Sentences to run from the date of conviction.

Solicitors for the appellants: *Clarke & Co.*

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE BRAY, AND MR. JUSTICE A. T. LAWRENCE.

MICHAEL McGERLYNCHIE.

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Fresh evidence—Verdict alleged to be against the weight of evidence.

This was an application for leave to appeal against conviction, the application having been referred to the full Court by Mr. Justice A. T. Lawrence. There was also an application for leave to call further evidence. The applicant was indicted before the Recorder at Bradford Quarter Sessions on April 3rd, 1909, for stealing and receiving gas fixtures. He was found guilty, and sentenced to eighteen months' imprisonment with hard labour.

Chapman for the applicant (under sect. 10 of the Criminal Appeal Act), who was not present. Applicant was indicted in the following circumstances:—According to the evidence of a constable named Coles, applicant and one Fisher were seen in a yard of an unoccupied house backing upon Queen's Road. It was about 2.20 p.m., and the constable, knowing the applicant by sight, spoke to him and said: "What have you got in that bundle?" Applicant's companion, whom the prosecution alleged to be Fisher, was carrying a bundle. In reply to the constable, applicant retorted, "Look for yourself," and began to undo the bundle which his companion had set down. While applicant was undoing the bundle, the man who had originally been carrying it ran away. Fisher was afterwards charged with being this man and was tried on April 3rd, immediately before applicant, but was acquitted upon the evidence of applicant, who denied that Fisher was the man and swore that the other man was one Firth. It came out that the gas fixtures had in fact been stolen from the very house in the yard of which applicant and the other man were discovered, but according to applicant's story, on the afternoon in question, he met, at the end of

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Queen's Road, a man named Firth who asked him to lend some assistance with a bundle, and applicant, knowing Firth, and desiring to earn a copper, went with Firth to the yard in question where the bundle was produced by Firth. The meeting with Firth was accidental; he knew nothing of the contents of the bundle. It was desired to call as a witness a man named Rouse. Rouse could say that on this afternoon he met Firth in Queen's Road, that Firth asked him to help him carry a bundle, and that he, Rouse, having something else to do, refused. Rouse happened to turn round a few minutes after his refusal, and saw Firth accosting applicant. Applicant declared that he gave information to a detective as to the address and description of Firth.

Darling J.: Communication must be made to Bradford to ascertain whether applicant did give the alleged information to a detective, and if he did, his name.

The Court having been informed later in the day that information as to Firth had been given to a detective named Pounds, leave to appeal was granted, and also leave to call Rouse and Detective Pounds.

Applications granted.

William Hillier.

WILLIAM HILLIER.

Severity of sentence.

This was an appeal from an order of Mr. Justice A. T. Lawrence, refusing leave to appeal against sentence.

Appellant was indicted before the Chairman at the West Kent Quarter Sessions on April 7th, 1909, for housebreaking and burglary. He pleaded guilty, and was sentenced to three years' penal servitude.

R. A. Gordon for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. The learned Chairman was unduly influenced by the evidence given by an inspector with regard to appellant after the latter had pleaded guilty. It appeared that

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a woman named Crisp, with whom appellant lived, was found to be pledging property which was identified as being the proceeds of burglaries committed. She was arrested, whereupon appellant went to the police station, gave himself up, and confessed to three burglaries, saying that the woman had nothing whatever to do with them. In order to clear the woman, appellant gave every information and assistance to the police, whereby nearly all the stolen property was recovered. Ultimately the woman was found guilty of receiving upon one indictment. The inspector, in giving his evidence, said that appellant served seven years in the army, leaving it with a good character. He had done no regular work since then, and was suspected of committing several burglaries, and since appellant's arrest the series of burglaries had ceased. In 1904 appellant was sentenced to one month's hard labour for "frequenting." Since the evidence of the inspector was given, a message had been received by this Court from the police saying that since appellant's arrest there had been several more burglaries. The evidence of the inspector, which turned out to be incorrect in some details, unduly influenced the learned Chairman in passing so severe a sentence.

Bray J.: No doubt the sentence is a severe one, but it must be remembered that the appellant pleaded guilty to three burglaries, and burglary is a serious offence. A statement was made at the trial suggesting that appellant was responsible for several other burglaries, but that statement turns out to have been unfounded. Therefore we have only to consider the three burglaries to which appellant did in fact plead guilty. Having regard to them, we cannot say that the sentence of three years' penal servitude was too severe, although it is possible that any one of us might not have given quite the same sentence. That is, however, not the question.

Appeal dismissed. Sentence to run from date of conviction.

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James Hill.

JAMES HILL.

On the trial of an indictment under sect. 11 (9) *of* 32 *&* 33 *Vict. c.* 62 (*the Debtors Act*, 1869), *evidence may be given of the existence of a "book or document" before the "four months" mentioned in the sub-section.*

This was an appeal against conviction on points of law, and an application for leave to appeal against conviction upon the facts.

Appellant was indicted before the Recorder at the Central Criminal Court on March 23rd, 1909, under sect. 11 (9) of the Debtors Act, 1869, for destroying and concealing books and documents relating to his property and affairs after a petition in bankruptcy had been filed against him. He was found guilty, and sentenced to four months' imprisonment in the second division.

R. V. Bankes for the appellant, who was not present. Appellant was charged with destroying and withholding trade books and papers with the object of concealing the true state of his affairs. But the accountant who was sent to inspect the books was shewn every document he asked to see, and every assistance was given him. There had been no concealment at all. The document upon which reliance was mainly based by the prosecution was a ledger. It was suggested that the ledger had been burnt, although two witnesses said that it had not, and the ledger itself was produced in Court.

[Bray J.: The ledger produced was new, without a single entry in it.]

The appellant never really kept books at all. Entries were made on slips of paper, and some invoices were retained. It was true that appellant had had experience as a book-keeper. It was also true that there was a bonfire on the appellant's premises after the petition had been presented. With regard to the ledger produced, appellant had bought it in 1907 on the advice of a friend, with the intention of using it. The man from whom he bought it was called at the trial. Appellant's clerk was also called to prove that although the ledger was there, it had never been used. A witness named La Croix was called by the prosecution to say that two years previously, when he had visited appellant, the latter had turned to a ledger to make a reference. This

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evidence was objected to at the trial, and ought not to have been admitted at all, inasmuch as under the Act the material time for the accused to have had books in his possession was within four months after the bankruptcy petition. This particular witness was a prejudiced witness, hostile to the appellant as a result of being a creditor in the bankruptcy proceedings. The attention of the jury was never directed to the ledger produced, but their general verdict was taken to cover the charge with regard to its destruction. Appellant was also charged with destroying delivery books, with regard to which there was no evidence at all. The witnesses for the prosecution could not specify a single book that was burnt.

Graham Campbell, for the Crown, was not called on.

Darling J.: As to the points of law raised, namely, that there was no evidence, and that the evidence for the Crown was wrongly admitted, one must realise with regard to the first that there was evidence that appellant had destroyed books, in respect of which witnesses on the opposite sides were saying yes and no. All that was before the jury, and it was for them to judge. With regard to the second point, the evidence of the witness La Croix is objected to because his evidence was with regard to a state of things two years ago, and did not deal with the period named in the section under which this prosecution proceeded. But the learned Recorder dealt with that objection, and told the jury that it only affected the weight of the evidence generally that he had had a ledger at some time. It cannot be said that a proper warning to the jury was wanting. There is no ground for allowing an appeal upon the facts.

Appeal dismissed. Sentence to run from April 16th, 1909.

Solicitors for the Appellant: *Osborn & Osborn.*

GEORGE MORTON.

George Morton.

Severity of sentence.

This was an appeal against sentence, leave having been granted by Mr. Justice Darling.

Appellant was indicted before the Chairman at the Middlesex Sessions on April 5th, 1909, for housebreaking. He pleaded

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guilty, and was sentenced to eight years' penal servitude, followed by two years' police supervision.

Appellant, in person. It was given in evidence against him at the trial, after he had pleaded guilty, that he had spent seventeen years in prison. That was not correct, as he had not served more than twelve years altogether.

Laurie, for the Crown. Appellant was convicted with another man named Pilcher. Appellant, in his notice of appeal, had said that the learned Chairman gave as the reason for passing so long a sentence, that he desired to keep appellant out of Pilcher's way. There was nothing to support the suggestion in the shorthand notes. Appellant had a long list of previous convictions, stretching from 1896 to 1905, and was actually arrested on a different charge of another date, which should be taken into consideration.

A. T. Lawrence J.: The appellant pleaded guilty to the charge, and was sentenced to eight years' penal servitude, followed by two years' police supervision. There is also a *remanet* of one year and 122 days of a previous sentence. The sentence is severe, but appellant's record is bad, and he has been convicted of similar offences before. In the present case, property to the value of £152 was stolen. The Court cannot interfere, especially in view of the Prevention of Crimes Act, 1908 (8 Edw. 7, c. 59), which comes into force on August 1st this year. As this Court said in the case of *Thompson* (2 Crim. App. R. 112, above), the Home Secretary, when the time comes, may commute the sentence to one of preventive detention.

Appeal dismissed.

George Christopher Palmer.

GEORGE CHRISTOPHER PALMER.

Severity of sentence.

This was an appeal against sentence, leave having been granted by Mr. Justice Darling.

The appellant was indicted, before the Chairman at the Middlesex Sessions, on April 5th, for larceny. He was found guilty, and sentenced to three years' penal servitude.

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George Christopher Palmer.

Appellant, who was not present, was not represented.

Hibbert, for the Crown: Appellant was convicted of stealing goods from a grocer's truck. The value was only 2*s.* 3*d.*, but this was a case where goods were necessarily left exposed while the grocer's lad was busy delivering. It was not a case where goods were displayed outside a shop without any protection. The grocer had no other way of delivering his goods. Appellant had been twice previously convicted, and was known to the police as a trainer of thieves. Appellant in his notice of appeal said that the articles were very tempting.

Bray J.: This is, no doubt, a heavy sentence, but when we look at the character and antecedents of the appellant we feel we ought not to interfere. The Chairman, in passing sentence, recommended the appellant for the Borstal system, but it appeared that he had previously undergone such treatment, and that therefore he was disqualified. We are, however, informed by the Commissioner of Police that the appellant will receive some benefit from that recommendation, and can be treated as a juvenile adult.

Appeal dismissed.

JOHN FAGAN.

John Fagan.

Alleged mistaken identity.

This was an appeal against conviction on a certificate granted by the judge at the trial.

Appellant was indicted before the Recorder, at the Newcastle Quarter Sessions, on April 2nd, 1909, for being in possession of housebreaking implements by night. He was found guilty, and sentenced to nine months' imprisonment with hard labour.

Youll for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. In consequence of information received that burglarious implements were hidden in a plantation just outside Newcastle at a place called Castle Leazes, two police officers, Beck and Thompson, went at night to the place to watch. Beck wore women's clothing. While watching, the two officers saw three men go to the place in question, dig up various implements,

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and secrete them about their persons. The officers, strolling up arm-in-arm, accosted the men, whereupon a desperate affray took place. Thompson caught one of the men called McGreavy, while Beck struggled with another called Wilson. This was at 9.30 p.m., when it was dark. The nearest gas lamp was some distance away. While Beck was struggling with Wilson the third man (Fagan) came up, and Beck addressed him by name. He also called out to Thompson, "Look out, Fagan has a jemmy." Fagan was not arrested until afterwards, when he set up an *alibi*. It was upon the strength of this *alibi* that the Recorder had certified. Evidence was given by the prosecution as to a conversation in the cells between the three accused which was overheard. It purported to be a conversation making an agreement as to what should be said when they were brought up. The Recorder pointed out the practical impossibility of such a conversation taking place, and its extreme improbability. Upon the whole of the evidence, the verdict of the jury was unreasonable, and could not be supported. There had been a miscarriage of justice.

Lord William Percy, for the Crown, was not called on.

Darling J.: The Recorder certified in this case on the ground that it was just possible that the police might have been mistaken as to the appellant. We do not think they could have been mistaken. They recognised appellant, whom they knew, and they spoke of him by name.

Appeal dismissed.

Josiah Haden.

JOSIAH HADEN.

Degree of guilt may be reduced by the drunken condition of the accused at the time of the offence (*a*).

The time of detention before trial may be properly taken into account in passing sentence (*b*).

This was an appeal against sentence, leave having been granted by Mr. Justice A. T. Lawrence.

Appellant was indicted before the Chairman at Wakefield

(*a*) Cf. *Morton*, (1908) 1 Crim. App. R. 255.
(*b*) See p. 95, above.

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Josiah Haden.

(West Riding) Quarter Sessions on April 5th, for larceny. He pleaded guilty, and was sentenced to twelve months' imprisonment with hard labour.

Appellant, who was not present, was not represented.

Lawrie, for the Crown: Appellant was charged with stealing a pair of boots from the front of a shop where they were hanging. The value of the boots was small, but appellant had been five times previously convicted of similar offences. Apparently appellant was in drink at the time. Whenever he got drunk he stole.

Darling J.: It appears from counsel's statement that appellant was drunk when he committed this offence. Apparently he was more drunk than the Chairman gave him credit for, because the Chairman told the jury that appellant was only drunk to a certain extent. It appears that appellant steals things when he is drunk. Apart from that he gets his living by work in a proper way. In this case he took the boots in the presence of a boy, and having got them, he dropped them over a wall. On being spoken to, he leaned over the wall and recovered them for the owner.

As we have already pointed out in a case that came before this Court, *Nuttall*, (1908) 1 Crim. App. R. 180, it is much easier for us to deal with questions affecting sentences where the prisoner has pleaded guilty at the trial. When there has been no hearing, the judge at the trial, not being able to observe the prisoner's demeanour, is in no better position than we in this Court. In this case we think the proper sentence would have been six months' imprisonment with hard labour. Appellant had, however, been in prison three months before his trial, and therefore the proper sentence would become three months' imprisonment with hard labour. We therefore think the present sentence must be reduced to three months' imprisonment with hard labour, to run from the date of the conviction.

Sentence reduced.

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Charles Cutting.

CHARLES CUTTING.

Proviso to sect. 4 (1) *of the Criminal Appeal Act*, 1907.
Misreception of evidence, but "no substantial miscarriage of justice."

This was an appeal against conviction on the certificate of the judge granted at the trial.

Appellant was indicted before the Chairman at the Cardiganshire Quarter Sessions, on April 8th, 1909, for obtaining goods by false pretences.

He was found guilty, and sentenced to six months' imprisonment with hard labour.

Griffith Jones for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present.

Appellant was a commission agent in the provision trade, and travelled about as the representative of various firms. In June, 1908, he called upon a Mr. Rae, the prosecutor, and received an order from him. An intimacy sprang up between them, and on more than one occasion the prosecutor cashed cheques for appellant which were afterwards honoured. When appellant drew those cheques he had a small balance at the bank. In July, 1908, prosecutor had some York hams in his shop, which appellant saw and wanted to buy. He said that he was commissioned by Duttons, of Chester, to get six York hams. Eventually, after some demur, the hams were sold to appellant on July 16th, and invoiced to him. That appeared in the prosecutor's books. It was said that at the time when appellant bought the hams for Duttons, Messrs. Dutton had revoked the authority previously given to appellant to deal on their behalf. He apparently never knew that his authority had been revoked, and, in any event, when he sent the hams to Messrs. Dutton, they were accepted. A witness was called named Walker, who gave evidence as to a general system of fraud practised by appellant. This evidence was objected to, as the indictment did not charge an obtaining credit by false pretences, but falsely representing that appellant was Duttons' agent; and the learned Chairman, although he admitted it, afterwards told the jury that he regretted he had done so. General evidence such as Walker's was irrelevant to the question whether appellant was an agent of Duttons. An invoice for the hams was eventually sent to Duttons on October 3rd, after appellant's cheque for £3 : 7*s.* 0*d.* was dishonoured, but that was only when the pro-

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secutor failed to get the money from appellant. The prosecutor had received a cheque from the appellant in payment for the hams, which was dishonoured.

Douglas Lewis, for the Crown. The strongest piece of evidence with regard to fraudulent intent was the fact that, while the appellant bought the hams at 1*s.* per pound, he sold them to Duttons at 10*d.* per pound; and although he had been paid by Duttons on July 31st for the hams, yet on September 24th, when, having finished other transactions with Rae, he was asked, "What about Duttons' account?" he replied, "Oh! make me out an invoice for them and I will collect it as I pass through Chester to-morrow, and will send on the amount." This invoice to Duttons was produced from his custody at the trial at Lampeter. These two incidents were relied on as facts from which the jury might properly infer fraud. The cheque in question was not in payment for the hams which were the subject of the indictment, but for other private transactions, for on September 24th he was pretending that that debt was still unpaid.

Darling J.: It is perhaps possible that this case might have been left to the jury in a better way, because the summing-up does not call the jury's attention to all the points in the case; for instance, the question of intent to defraud. The learned Chairman also admitted evidence which he afterwards had to tell the jury to disregard altogether. Of course, he did not know what the witness Walker was going to say, when he allowed him to be called. But the powers given to us by the Act are very wide, and although the appeal might be decided in favour of the appellant, we can, under the proviso to sect. 4 of the Criminal Appeal Act, dismiss the appeal if we consider that no substantial miscarriage of justice has occurred. The facts of the case shew that appellant got hams from the appellant by fraud, and he endeavoured to better himself with Duttons at the prosecutor's expense.

Appeal dismissed.

BEFORE THE

MR. JUSTICE DARLING, MR. JUSTICE JELF, AND MR. JUSTICE BRAY.

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3 *May.*

George Bennett.

GEORGE BENNETT.

Sect. 16 (1) *of the Criminal Appeal Act*, 1907, *and Rule* 52 *thereunder—Leave to appeal given owing to the absence of transcript of the summing up.*

This was an appeal from an order of Mr. Justice A. T. Lawrence refusing leave to appeal against conviction, which took place on April 8th, 1909, at the Cardigan Quarter Sessions, for burglary.

Appellant, who was not represented, was not present.

JELF J.: In this case the appellant was sentenced to five years' penal servitude for burglary. For some reason unexplained there is no shorthand note of the learned Chairman's summing up. Under the Criminal Appeal Act every prisoner who has a right of appeal to the Court of Criminal Appeal has a statutory right to have a shorthand note taken of the proceedings at his trial. Without saying any more, we think that the observance of this provision is so important that the appellant in this case should have the advantage of having his case argued by counsel before this Court.

Leave to appeal and legal aid granted.

Jack Aleron.

JACK ALERON.

A judge in passing sentence may take into account other charges pending against defendant.

This was an application for leave to appeal against sentence, the application having been referred to the full Court by Mr. Justice A. T. Lawrence.

The applicant was indicted before the Chairman at the West Kent Quarter Sessions on April 7th, 1909, for larceny as a bailee

and for obtaining goods by false pretences. He pleaded guilty to the misdemeanour, the other charge not being proceeded with, and was sentenced to five years' penal servitude.

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Jack Aleron.

R. V. Wynne for the applicant, who was not present.

The applicant had been in work for over four years, and was resolved "to turn over a new leaf." The applicant relied upon the mercy of the Court. He admitted his guilt on two charges made since his last conviction on April 7th.

Bray J.: The sentence in this case was no doubt a severe one. The indictment to which the applicant pleaded guilty contained a charge of obtaining goods to the value of £4 10*s.* by false pretences. He has a very bad record, having been previously convicted six times since 1887. In 1903 he was sentenced to three years' penal servitude. When before the Chairman, it appeared that there were three other charges pending against the applicant in addition to those with which he was indicted. It now appears that there were two others beside the three, making five in all. Although only three charges were known to the Chairman, the sentence passed was not excessive or unreasonable. However, as two additional charges, in respect of which warrants had been issued, have been brought to light by this appeal, we may say at the request of the applicant, that we think that the sentence passed may be taken to cover them also, so that on his release he will have a "clean sheet" (*a*).

Application refused.

Solicitors for the appellant: *Field & Co.*

THOMAS MILBURN.

Thomas Milburn.

If a notice of application for leave to appeal, though in form an application as to sentence, is in fact intended as an application against conviction, the Court may treat it as such.

This was an appeal from an order of Mr. Justice A. T. Lawrence refusing leave to appeal against conviction and sentence.

Appellant was indicted, with six others, before the Chairman at the Durham Quarter Sessions on April 5th, 1909, for housebreak-

(*a*) See *Taylor*, p. 158, below.

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Thomas Milburn.

ing and receiving. He at first pleaded not guilty, but after some evidence had been given, he stated to the jury that he had received some of the stolen goods, and was convicted of receiving and sentenced to nine months' imprisonment with hard labour.

Paley Scott for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present The appellant was indicted with six others for housebreaking and receiving He pleaded guilty to receiving, but it was evident from his notice of application for leave to appeal against sentence *only* that he did not know that want of guilty knowledge was a defence to that charge, for he put that forward merely in mitigation of sentence.

[The Court allowed the notice to be treated as an application in respect of conviction also.]

He never intended to withdraw his plea of not guilty, but the Chairman and the jury naturally regarded his statement as a withdrawal of his plea of not guilty, and therefore never considered his case on the evidence as they ought to have done—in which case he might have been acquitted. As far as the charge of housebreaking was concerned, the learned Chairman said there was no evidence against him. The robbery in question was committed on February 10th, 1909, when a number of mufflers and handkerchiefs were stolen from an outfitter's shop in Gateshead. Two days afterwards the appellant was seen in the company of the four prisoners, Brady, Callaghan, Fraser, and Devlin, who pleaded guilty to the charge at the trial. On February 15th, 1909, an inspector of police went to appellant's house, where he found him sitting with several of the other accused, including Callaghan and Fraser. On searching the house two mufflers were found, but appellant gave an explanation as to each. There was no evidence that these were in appellant's possession. He said, when charged at the police-station, that he did not know that they were stolen.

Jelf J.: The Court ought not to be too strict as to the form of a defendant's notice of application if, in fact, it is an application against conviction. With regard to the appeal against conviction, the appellant was found to have articles in his house, which, four days before, had been stolen. The articles found were identified,

and appellant told a lie with regard to one, saying that it was his little boy's, and that he had had it for some considerable time. Those who pleaded guilty to the theft were found resorting to his house, and the whole of the evidence goes to shew that the appellant was mixed up in the business and had knowledge of the transaction. If we gave leave in this case, we might very well give leave in every case that came before us. As to the sentence, we do not think it is too much, having regard to the appellant's record.

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Applications dismissed.

JAMES JOHN RYE.

James John Rye.

Summary list—Sect. 15 (2) *of the Criminal Appeal Act*, 1908.
If an indictment charges the taking of various goods, the presumption is that the taking is at one time.

This was an appeal on a point of law against conviction at Huntingdon Quarter Sessions of larceny on April 6th. The sentence was imprisonment with hard labour for six months. The case came before the Court under its summary jurisdiction, and the appellant, who was not represented, was not present.

Jelf J.: This is an appeal upon a supposed point of law. The charge against the appellant was that between October 21st, 1908, and February 9th, 1909, he stole various articles. He was found guilty, and sentenced to six months' imprisonment with hard labour. The appeal is on the ground that the indictment is bad for duplicity. The objection was taken before plea, and therefore everything is in order, assuming the indictment to be wrong. This matter is dealt with by 24 & 25 Vict. c. 96 (Larceny Act, 1861). Sect. 5 of that Act provides that several counts may be inserted in the same indictment "for any number of distinct acts of stealing, not exceeding three," committed by the same person within six months "from the first to the last of such acts." By sect. 6, if the property is alleged in the indictment to have been stolen at one time, and it turns out that it was stolen at different times, the prosecution has not to elect "upon which taking" they shall proceed if there have not been more than three

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James John Rye.

takings, or more than six months elapsing "between the first and the last of such takings." It is necessary to see whether the indictment in this case alleges that the property was taken at one time. It alleges that all the articles were stolen between the two dates (above). In the absence of anything to the contrary, the indictment in fact alleges that all these things stolen were taken at one time. The evidence was that most of them were taken on one day (February 9th), and the rest—six pairs of corsets—between October 21st and October 31st. Strictly, there ought to have been one count for the corsets and one count for the other things. But it does not appear that there were more than three takings altogether. The result is the same as if no date had been mentioned at all. In this case, had it not been so perfectly obvious, we should have given leave to appeal. As this hearing has been delayed through no fault of the appellant's, sentence will run from the date of conviction.

Appeal dismissed. Sentence to run from date of conviction.

John Charles Williams.

JOHN CHARLES WILLIAMS.

Sentence reduced in view of fresh evidence.

This was an appeal against sentence, leave having been granted on April 22nd by the full Court, on appeal from an order of Jelf J., who had refused leave. The Court had also directed further evidence to be called.

Appellant was indicted before Mr. Commissioner Rentoul at the Central Criminal Court on March 24th, 1909, for stealing and receiving a quantity of lead. He was found guilty and sentenced to three years' penal servitude.

Burnie for the appellant (under sect. 10 of the Criminal Appeal Act), who was present. The Court had already given leave to call further evidence. It was rather assumed by the learned judge that the appellant, who was indicted with two other men, Newman and Sneesby, was the promoter and instigator of the crime. Evidence was available to shew that Newman, and not the appellant, was the principal transgressor.

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John Charles Williams.

Mrs. Sturley, examined by *Burnie*, said: I am the wife of the appellant. His real name is Sturley. I remember the time, two or three weeks before last Christmas My husband had no money then. One day, when my husband was out, Newman called at my house and asked for my husband. He had another man with him. He said he had let my husband have some stuff, which he wanted to be paid for or to have returned. He told the man who was with him that he (Newman) had let my husband have the stuff for 10*l.* I told him that my husband had no money, whereupon he used foul language to me. Both the men came back twice again that day. It was nearly twelve o'clock midnight when they last came. The other man, whose name I do not know, offered me money, as I told him I had had no food all day. He said, "I am not going to lose my situation, they have missed some stuff, and I want it returned, otherwise I shall have your husband arrested." Newman came three or four times after that. I always told him that my husband was out, even if it was not true. My husband received letters from Newman, which I read. They accused my husband of letting Newman down by not keeping an appointment with a van. In one letter it said, "Wasn't it dark enough for you last night?" In another it said, "Why don't you act up as a man?" The police inspector (Ball), in my presence, told my husband after his arrest that it would be better for him if he gave full information about Sneesby and Newman.

Cross-examined by *Purcell*. I know where the Marsh Gate Tavern is. It is close to the prosecutor's factory. Newman did say at the trial that my husband met him there. My husband never told me that he had received several considerable sums of money from Messrs. Bowes, amounting to 81*l.* 12*s.* 9*d.* I was not at home when the vanload of lead was brought to my house.

Burnie: It now appears that appellant told the police about Newman and Sneesby Moreover, the depositions showed that Newman bargained for a van, apart from Williams. There is no evidence to support the hypotheses upon which the sentence proceeded.

Purcell, for the Crown: With regard to Newman and Sneesby, the former had been employed by the prosecutor for the last four years, and the latter for nine. Whereas they were mere lads, the appellant had experience and knowledge of the world. He pleaded

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guilty to seven larcenies, ranging from November to March. Twenty tons of lead had been stolen, and he had received four hundred pounds from the wholesale purchasers. There were three previous convictions against him. He was caught in the actual possession of the last vanload of the stolen property. It was significant that the appellant was known to have gone to the public-house in the district where Newman and Sneesby were, in fact, close to the factory. Newman and Sneesby did not come into appellant's neighbourhood.

[Bray J.: There does not seem to be any ground for saying that one party was more the tempter than the other.]

Jelf J.: In this case there seems to have been no means of discovering the tempter. In all cases it is undesirable to alter the sentence unless the judge at the trial has clearly gone wrong. However, in the present instance the learned judge, somehow or other, got the idea into his head that the appellant was the instigator, and though, no doubt, it was a very serious offence that was committed, and though appellant is the oldest of the three, yet there does not seem to be any ground for making so much difference between the prisoners as was in fact made. Newman and Sneesby were sentenced to twelve months' imprisonment with hard labour, and we think that the appellant's sentence should be reduced to imprisonment with hard labour for eighteen months, to run from the date of conviction.

Sentence reduced.

Joseph M. Taylor.

JOSEPH M. TAYLOR.

Where possible, all pending charges against a defendant should be disposed of by one sentence.

Syres (a) *affirmed.*

Whether it is legal by a second consecutive sentence to impose more than two years' imprisonment with hard labour; quære.

This was an appeal against sentence, leave having been granted by the full Court.

Appellant was indicted before the Recorder at Burnley Quarter

(*a*) 1 Cr. App. R. 172 (1908).

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3 *May.*
Joseph M. Taylor.

Sessions on April 6th, 1909, for obtaining money by false pretences. There were two indictments. The appellant was found guilty upon the first of these, and then pleaded guilty to the second. He was sentenced to fifteen months' hard labour.

Appellant, who was not present, was not represented.

Sellers, for the Crown: Appellant had been previously convicted continuously since 1882, and was sentenced to imprisonment with hard labour for twelve months in 1905. In June, 1908, he was brought before the magistrates at Rochdale under the Prevention of Crimes Act, and received twelve months' imprisonment with hard labour. The offence with which appellant was charged was committed in 1907. The false pretence alleged was that appellant held himself out as being a debt collector for a firm in Manchester. When before the magistrates at Rochdale, the present charge, in respect of which a warrant was then out, was mentioned. This, however, was not taken into account. On April 6th, 1909, appellant was taken from prison and put upon his trial for the offence committed in 1907. He received fifteen months' hard labour, to run consecutively to the sentence he was serving. The result of that was, in effect, to give appellant imprisonment with hard labour for more than two years, a sentence which could not be legally passed.

Bray J.: In this case the appellant was sentenced to fifteen months' imprisonment for obtaining small sums of money by false pretences. In June, 1908, he was charged with similar offences under the Prevention of Crimes Act, and although the present offence was known no notice was taken of it. The previous convictions were mentioned, as also were some other offences, but not this particular one. It is desirable that when a prisoner comes out of prison he should have a "clean sheet," and this was the principle laid down by the Court in the case of *Syres* (*b*). The decision in that case applies to the present. We therefore think that the sentence must be set aside and one of three months' imprisonment with hard labour substituted for it.

Sentence reduced.

(*b*) 1 Cr. App. R. 172 (1908). See *Aleron*, p. 152, above.

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3 *May.*

Henry Markham.

HENRY MARKHAM.

All pending charges against a defendant should be mentioned to the Court upon the first conviction with a view to a comprehensive sentence.

This was an appeal against sentence, leave having been granted by Mr. Justice Jelf.

The appellant was indicted before the Chairman at Devonshire Quarter Sessions on April 7th, 1909, for false pretences. He was found guilty, and sentenced to eighteen months' imprisonment with hard labour.

Appellant, who was not present, was not represented.

Dummett, for the Crown: The appellant was convicted of obtaining a sum of £50 from the prosecutrix by false pretences. He inserted a matrimonial advertisement in the *Western Morning News* on October 12th, 1907, which was answered by her. Appellant and she became engaged, and on the representation that the appellant was purchasing a boarding-house, by means of which business was to be carried on after marriage, she advanced him the money in cash. The £50 was lent to make up the purchase price of £400. When the wedding day came appellant was not to be found. He was sentenced in 1908 at Chichester upon another charge to twelve months' imprisonment with hard labour. There was then a warrant out in respect of the present charge, and an inspector was on his way to Chichester at the time of the trial to tell the Court about the warrant that was pending. He arrived too late, however, and nothing was said. Appellant served the twelve months, and upon his release in 1909 he was re-arrested on the present charge.

Bray J: This is an appeal against a sentence of eighteen months' hard labour. The ground of appeal is, that at the time when the appellant was convicted at Chichester in 1908, the present offence, which was committed in 1907, was known to the police. In fact a warrant was out in respect of it. It is said that an effort was made to inform the Court about it, but nothing was in fact said, because the inspector did not arrive in time. As we have

already said in *Syres* (*a*), a prisoner should have a "clean sheet" when he comes out of prison. Appellant was sentenced at Chichester in 1908 to twelve months' imprisonment with hard labour. Doubtless if the present offence had been mentioned then, the appellant would have got a more severe sentence than he did, and therefore we must give some additional punishment. The sentence against which an appeal is now made must be reduced to six months' imprisonment with hard labour.

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3 *May.*
Henry Markham.

Sentence reduced.

ROBERT McDOWALL.

Robert McDowall

Severity of sentence.

This was an appeal against sentence, leave having been granted by Mr. Justice A. T. Lawrence.

Appellant pleaded guilty before the Chairman at the West Kent Quarter Sessions on March 9th, 1909, to two indictments, each charging him with obtaining one shilling by false pretences, and was sentenced to eighteen months' imprisonment with hard labour.

Appellant appeared in person.

Ronald Smith, for the Crown: The appellant had practised a systematic fraud. He had been employed by a firm publishing a trade directory to travel round and solicit entries from various people. The fee of 1*s.* was charged in each case for the insertion. In January, 1909, his employment ended, but nevertheless he continued to go round as before, and he succeeded in obtaining many sums of 1*s.* on the representation that he was travelling for the firm. He had been previously convicted in Scotland and sentenced to nine months' imprisonment with hard labour.

Jelf J.: Appellant pleaded guilty to this offence. He obtained money by using the forms and circulars belonging to a

(*a*) 1 Cr. App. R. 172 (1908). See *Taylor*, p. 158, above.

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3 *May.*
Robert McDowall.

firm by which he had been engaged, but in whose employment he had ceased to be. Appellant was at one time a man in a good position, he was a writer to the signet in Scotland. Possibly we might not have passed the same sentence, although this was a bad systematic fraud. That is, however, no ground for interfering with the present sentence.

Appeal dismissed.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE BUCKNILL AND MR. JUSTICE BRAY.

MARK RUBENS AND MORRIS RUBENS.

1909
4 *May.*
Mark Rubens and Morris Rubens.

Murder—All engaged in a common design to commit a felony are guilty of murder, though only one strikes the fatal blow.

These were applications for leave to appeal against conviction, and on the part of the second appellant for leave to call further evidence.

The appellants were convicted of murder, before Mr. Justice Jelf at the Central Criminal Court on April 23rd, 1909, and sentenced to death.

Leycester (with him *Forrest Fulton*) for Mark Rubens, who was not present. The two applicants were indicted for the murder of a man named Sproull, a ship's engineer, in the early morning of March 16th, 1909. The deceased, who was second engineer on board the "Dorset," arrived with his ship from Australia at the Victoria Docks, London, on March 15th, 1909. He and the mate, named M'Eacharn, went ashore together, visiting numerous public-houses. By 11 o'clock p.m. they were both in a state of intoxication. In Liverpool Street they came across two women, Allen and Stevens, otherwise known as Brookes. They got into conversation with the women, had drinks with them, and eventually accompanied them to a room belonging to the woman Allen, where she lived with Morris Rubens. The other woman, Brookes, lived with Mark Rubens in Whitechapel. It was clear from the evidence that the deceased was hopelessly intoxicated, as also was the woman Brookes. M'Eacharn was in much the same condition, while the woman Allen, though doubtless under the influence of drink, was not drunk. Consequently she was the only reliable witness of what took place. At about 1.10 a.m. in the morning, the front door, by which admission to the tenement was obtained, was heard

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to open, and the footsteps of two men were heard to go down the common passage leading to a yard at the back. The woman Allen went out to see who it was, and according to her evidence she found Morris and Mark Rubens. She told them that she and Brookes had two men there for the night, and persuaded them to go and sleep at Mark's lodgings in Everard Street. This they agreed to do. Allen then returned to the room, when a dispute arose between her and M'Eacharn with regard to money. Voices were raised, and the argument was at its height, when the door burst open and the two Rubens rushed in. According to the evidence of M'Eacharn, one of the Rubens struck first the deceased and then him with a stick. All that M'Eacharn remembered was that he found himself in the street, and that he afterwards complained to a police inspector about what had happened. The woman Allen said that she was so frightened when the fight began that she ran away. The woman Brookes was lying insensibly drunk upon the bed. The body of the deceased man was afterwards found lying in the gutter twenty yards from the house. He had been stabbed in the heart and was dead. The two Rubens, and the women Allen and Brookes, were subsequently arrested, but only the men were indicted. As to the evidence, M'Eacharn admitted that he could not remember how he got into the street, he could not remember going out to fetch fruit for the women just before the Rubens came in—although evidence was given as to that—so that no reliance could be placed upon his evidence at all. Allen said that the woman Brookes fell upon the bed directly they first arrived in the room, and that she was in a drunken slumber during the whole of the time the events in question happened. According to M'Eacharn's story, when the Rubens came into the room, Morris Rubens struck the deceased in the face with a stick. His evidence went no further than saying that there was a fight, in which he got some blows. Allen said that she did not see how the fight began. She saw M'Eacharn run away, and then Sproull, with the two Rubens, fought their way through the door into the road. She then went away, being frightened, but returned shortly afterwards to the room. The two Rubens then came in and she afterwards saw a small pocket-knife and stick upon the table. She had seen no stick or knife before that moment. She said to the Rubens, "Oh! what have you done?" but they told her she would be all right and was

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to go upstairs. Before she went she threw the knife behind the stove in the room. The only other evidence as to how the deceased was struck had to be gathered from the nature of the wound and the surrounding circumstances. The knife belonged to Mark Rubens, but was a small pocket-knife, not the kind of instrument to be chosen if the crime had been premeditated. Morris Rubens admitted that he took the deceased's watch and chain when he was lying in the road. It was put against the Rubens that when the police arrived they had taken refuge in other parts of the house, but this could be explained by the fact that they knew a fight had taken place, and that Morris Rubens had taken Sproull's watch and chain. There was evidence to shew that Sproull was a powerful seaman, and a match for both the Rubens. In the struggle he managed to twist the muffler Morris was wearing so tightly that possibly Mark produced the small knife wherewith to cut it, and not for the purpose of stabbing Sproull. In the scuffle the knife might have run into the deceased, and so killed him. The only complaint against the summing-up was that the learned judge told the jury that there was no way, which he could see, in which they could find the applicants guilty of manslaughter. He should have told them that, assuming the fight commenced without any intention to commit a felony, and that in the course of the fight Mark Rubens drew a weapon, they might find a verdict of manslaughter.

[Darling J.: There is no ground upon which that hypothesis can be based.]

There was a view of the facts by which the jury might have said it was manslaughter.

[Bray J.: How could the jury find Mark guilty of manslaughter only unless there was provocation, or a real quarrel?]

The jury were left in this position: that they had either to convict of murder or acquit altogether. The applicants were not called at the trial, because they were advised not to go into the box. The witnesses it was desired to call were witnesses as to character, and the two applicants themselves.

George Elliott (with him *Louis Green*) for Morris Rubens, who

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was not present. The statement of the woman Allen that she and Brookes were with M'Eacharn and the deceased from 6 p.m. on the 15th to 1 a.m. on the 16th March shewed that there was no possibility of communication between either her or Brookes and the two Rubens. Up to the time of the two Rubens bursting into the room there was no case against them—no suggestion of blackmailing. Morris Rubens was only armed with a light stick; it was in the nature of a sjambok, and therefore no murderous intent could be implied from its possession, it not being a lethal weapon. The robbery committed by him was clearly an afterthought. If he had known that Sproull was dead he would not have further associated himself with the affair by taking his watch. When Morris Rubens was arrested at the house, he said to Detective Wensley: "They threw a glass at one of the girls, so we set about them, and I ran up here with my missus. I don't mind telling you that I robbed the fellow that was lying on the ground over there. I hope he is not dead" Later on he said to the detective: "Do all you can for us; we never meant to murder the man." Allen admitted that there had never been a row in the house before, although she was constantly bringing men home. No blood was found on Morris Rubens's clothes, nor were there traces of his hands having been recently washed, when he was arrested.

[Darling J.: Morris's notice of appeal does not agree with Allen's statement.]

Taken on the whole there was no material contradiction. The learned judge did not sufficiently put the alternative side of the case, which was consistent with the evidence of Allen and M'Eacharn, namely, that the circumstances leading to the quarrel might have been consistent with the motive being some other than that of robbery, and, although reprehensible, not amounting in law to felony. If there was no felony, Morris was not liable for an act of Mark's. If Morris joined Mark in an assault, and Mark, without the knowledge of Morris, drew a knife in the struggle, then Morris was not guilty. Counsel cited *Price* (1858), 8 Cox C. C. 96; and *James Caton* (1874), 12 Cox C. C. 624.

[Darling J.: In the latter case there was no intent to commit a felony. In this case prisoners pleaded guilty to robbery with violence.]

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There was nothing in the summing-up to shew there might be circumstances under which Morris might be acquitted and Mark convicted.

Darling J.: This application for leave to appeal is brought upon the ground that the learned judge did not direct the jury upon the law governing cases where two persons make an assault upon a third person, and that third person is in some way killed. It has been usual for a long time to lay down the law in regard to this, in the precise terms which the learned judge used in this case. It has been complained that he did not tell the jury that they might find a verdict of murder or manslaughter against one, and acquit the other. We do not see how he could have pointed that out. The question of homicide depends upon unlawful design, and we do not think the learned judge left the matter in any doubt. This Court has power to interfere only where the verdict is unreasonable, or cannot be supported by the evidence, or where there is a wrong decision of law, or a miscarriage of justice. As to the evidence, it was pointed out that it left very little to the jury. It is said that the evidence pointed to a false conclusion, but both applicants refrained from going into the box. If they had gone into the box, their explanations would have been in conflict with the story told by the witness Allen, upon whose reliability the learned judge commented so favourably. We do not intend to say that this Court will never re-open a matter in a case where the prisoner has not gone into the box at the trial. If it were done in this case, it would be against the practice of this Court. It might, however, be done where there were special circumstances, but we see no reason for allowing them to be called now. It may be, however, that there is a distinction between the guilt of the two men. It is clear that Mark drew a knife and plunged it up to the hilt in the heart of Sproull. It was only one person who struck the blow, but it has been long laid down that Morris is also responsible for the blow. Though this is so in law, possibly, in the circumstances, those who have power which this Court has not, may consider any steps which may be rightly taken in this case. We have thought it well to indicate this, as we do not wish to close any door that may yet be left open.

Applications refused.

Solicitors for both applicants: *S. Myers & Son.*

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE JELF AND MR. JUSTICE BRAY.

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John Bowler.

JOHN BOWLER.

Misdirection—No caution to jury as to evidence of accomplices—Proviso to sect. 4 (1) *of the Criminal Appeal Act*, 1907.

This was an appeal by leave of A. T. Lawrence J. against conviction and sentence.

Appellant was indicted before the Chairman at the Derbyshire Quarter Sessions on April 17, 1909, for larceny and receiving. He was found guilty of receiving, but recommended strongly to mercy, and sentenced to eighteen months' imprisonment with hard labour.

Dr. Lindley for the appellant, who was present. Appellant was indicted with three other men, Smith, Tutin and Flewitt, for stealing and receiving some brasswork. The brass was stolen on the night of February 28th, 1909, and on March 2nd, at 9.40 p.m., it was brought to appellant, who was a brass-founder, by the other prisoners. He knew that one of the men had but lately come out of prison, and that another was a casual labourer in his own service. Appellant asked the men if it was "all right." He placed some of the brass in a disused furnace and locked the rest up. As soon as the men had gone the police arrived and arrested appellant. When at the station he tried to burn a letter as he was being searched. The learned Chairman in summing up said it was a most suspicious circumstance. He did not sufficiently caution the jury as to the evidence of accomplices, the evidence against him being that of the other three accused. In view of the recommendation, the sentence was too severe.

Cracroft, for the Crown, was not called on.

DARLING J.: We are of the opinion that this appeal ought to be dismissed. The summing-up is attacked, and it is not going too

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far to say that it is a most inartistic performance. It did not give the jury the usual warning with regard to accomplices, and it contains the Chairman's own views, some of which are absurd. We cannot say a single word in its favour, but at the same time we think that it has not caused a miscarriage of justice. The circumstances of the case are inconsistent with innocence, and though we think that this is the kind of summing-up which ought not to have been delivered, yet the case comes within the proviso to sect. 4 of the Criminal Appeal Act, 1907. The sentence, as to which the justices at Quarter Sessions were unanimous, is not too severe.

Appeal dismissed.

Solicitor for the appellant: *Arthur Barlow*, Nottingham.

BEFORE

MR. JUSTICE CHANNELL, MR. JUSTICE JELF AND MR. JUSTICE BRAY.

JAMES ELLIOTT.

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James Elliott.

The inadequacy of the transcript of the shorthand report of a trial is not a sufficient ground of leave to appeal, as the provisions of the Criminal Appeal Act as to those notes are merely directory.

If the Court allows a defendant either, when he is on oath, to read a statement from the witness-box, or to have his statement read for him by someone else, this is by way of indulgence to him, and if there is any irregularity under sect. 1 (*g*) *and* (*h*) *of* 61 & 62 *Vict. c.* 36 (*the Criminal Evidence Act,* 1898), *he cannot make it a ground of appeal.*

This was an appeal from an order of Mr. Justice A. T. Lawrence refusing leave to appeal against conviction and sentence.

Appellant was convicted before the Deputy-Chairman at Staffordshire Quarter Sessions on April 6th, 1909, of stealing from the person, and sentenced to six months' imprisonment with hard labour.

Snagge for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. It appeared that the prosecutor was standing at an auction sale, when he felt someone at his pocket. Turning quickly, he saw the appellant's hand being withdrawn from his pocket. He afterwards found that he had lost two florins. Appellant was arrested and searched, when two florins were found upon him, one of them being concealed in his boot. The appeal was on the ground that the appellant's evidence at the trial was not taken strictly in accordance with the provisions of sect. 1 (*g*) and (*h*) of 61 & 62 Vict. c. 36 (Criminal Evidence Act, 1898). Appellant went into the box, and having been sworn, began to read a statement, whereupon the learned Deputy-Chairman stopped him, and said that he would read the statement for him. He did so, but as it appears from the shorthand note that he was inaudible when he summed up, he may have

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been inaudible when he read the statement. Now, by sect. 1 (*h*) of the Criminal Evidence Act defendant might have read his own statement from the dock, so that, though the irregularities were in appellant's favour, they may be reason for leave to appeal. Appellant was not cross-examined upon his statement at all: this may have been due to its not being heard Moreover, there was no sufficient shorthand note of the summing-up. The official shorthand writer made a note that the learned Deputy-Chairman was almost inaudible when he addressed the jury. The note went on to record a few remarks which the shorthand writer heard and put together as best he could. It practically amounted to there being no note of the summing-up at all; in any case, it was so insufficient that it could not be regarded. The Court had previously held that every appellant had a statutory right to have the shorthand note of his trial. See *Rutter*, 25 T. L. R. 73; 73 J. P. 12; 1 Cr. App. R. 174 (1908); and *Bennett*, 2 Cr. App. R. 152, above. The insufficiency of the shorthand note justifies the Court in granting leave to appeal.

Channell J.: There is no ground for interfering in this case. As far as the shorthand note is concerned, apparently the official shorthand writer had not a clear idea of his duties; but it is necessary to point out what the real result of the decisions given by the Court are. They amount to this, that the provision of the statute with regard to there being a shorthand note taken of the proceedings at the trial, is directory only. The absence or insufficiency of a shorthand note is not of itself a ground upon which a prisoner can succeed upon appeal, nor the existence of a proper note a condition precedent to a good trial. Where, however, there is reason to suspect that there is something wrong in connection with the hearing of a case, the absence or insufficiency of a proper shorthand note may be material. As far as the way the appellant's evidence was given is concerned, it must be remembered that he had no right to read his statement in the box, and on oath. That is an indulgence allowed to prisoners by most judges, and only an indulgence, because it really means that the prisoner is allowed to put leading questions to himself, but, being to his advantage, he certainly cannot complain of it. The evidence in this case points conclusively to guilt, and the appeal must be dismissed. With regard to the date from which sentence shall

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run, the Act directs that the time pending appeal shall not be counted in the sentence unless it is otherwise ordered. In this case the appeal might first have been heard on May 7th, 1909, and the delay since then is the delay of the Court, and therefore the sentence must run from that date.

Application dismissed. Sentence to run from date on which the appeal was ready for hearing.

JAMES MELVILLE.

James Melville.

A judge is entitled to express his opinion on the defence that there was no animus furandi.

This was an appeal from an order of Mr. Justice Jelf refusing leave to appeal against conviction and sentence.

Appellant was convicted before the Recorder at Sunderland Quarter Sessions on April 2nd, 1909, for larceny, and sentenced to eighteen months' imprisonment with hard labour.

E. H. Chapman for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. Appellant was charged with stealing twelve blankets from the doorway of a shop where they were displayed for the purposes of sale. The theft was committed in such a casual way in the middle of the day, at a place where a number of people were passing, that it was difficult to say whether there was any *animus furandi* at all, more especially as there was evidence that appellant had been drinking heavily. In this case the intention of the appellant at the time he took the blankets was the essence of the crime. It was true that when he was asked what he was doing he dropped the blankets and ran away, but on the other hand the learned Recorder misdirected the jury in not putting the appellant's defence before them at all, and not telling them that the blankets must have been taken by the appellant *animo furandi*, in order to make him answerable for the charge. Where a prisoner is likely to be convicted, as appellant was, it becomes most important that the jury should be directed with especial care. Counsel cited *Warner*, 25 T. L. R. 142; 73 J. P. 53; 1 Cr. App. R. 227 (1908); *Deana*, 25 T. L. R. 399;

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2 Cr. App. R. 75, above; and *Farnborough*, (1895) 2 Q. B. 484; 64 L. J. M. C. 270; 73 L. T. 351; 44 W. R. 48; 18 Cox C. C. 191; 59 J. P. 905; C. C. R.

CHANNELL J.: There is no ground upon which we can interfere. The learned Recorder did not misstate any proposition of law, and although he did express a strong view upon the facts, the verdict is not unreasonable, or one that cannot be supported. The evidence was ample to justify a conviction.

Application dismissed. Sentence to run from May 7th, 1909 (*a*).

Alfred Dyer, Alfred Bellamy and Arthur Wakefield.

ALFRED DYER, ALFRED BELLAMY AND ARTHUR WAKEFIELD.

In the case of first offenders sentenced to imprisonment in the second division the Court is inclined to allow sentence to run from the date of conviction (*b*).

This was an application for leave to appeal against conviction, the application having been referred to the full Court by Mr. Justice A. T. Lawrence.

The applicants were convicted before the Deputy-Chairman at the County of London Sessions on April 20th, 1909, for breaking and entering a dwelling-house, and were sentenced to four months' imprisonment in the second division.

Stanley R. Crawford for the applicants (under sect. 10 of the Criminal Appeal Act), who were not present. The applicants were convicted of breaking and entering a dwelling-house and stealing a clock and one shilling in money. The prosecutor, a man named Baldwin, living at Hackney, left his house at 8 p.m. one evening in March, 1909. There was only Mrs. Edwards, his mother-in-law, left at home. From circumstances in evidence at the trial, it was proved that the offence was committed before 8.30 p.m., and yet in the evidence given by a woman named Clara Edwards, a neighbour, it appeared that one of the applicants was heard by her to say between 8.30 and 8.45 p.m., "They have gone out now and the door is closed." It was assumed that "they" meant the people of the house.

(*a*) See the last case reported.
(*b*) Cf. 1 Cr. App. R. 244.

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Alfred Dyer, Alfred Bellamy and Arthur Wakefield.

She also said she saw the three men come out of the house of Wakefield's sister at 8.15 p.m. It was proved that some boys saw some men go into a house at about this time, but it was not stated which house it was. Mrs. Clara Edwards was never asked whether the men whom she saw between 8.30 and 8.45 p.m. were carrying any parcel. The application was made upon the ground (1) that the verdict was unreasonable and against the weight of evidence; (2) and that the defence was never put to the jury.

Counsel referred to *Warner*, 25 T. L. R. 142; 73 J. P. 53; 1 Cr. App. R. 227 (1908); *Deana*, 25 T. L. R. 399; 2 Cr. App. R. 75, above.

Prisoners were undefended.

CHANNELL J.: There is no ground for interfering in this case. The strongest complaint that is made against the summing-up is that the learned Deputy-Chairman failed to put the defence to the jury. As to the cases to which reference has been made, they only apply where there is ground for suspecting a miscarriage of justice. Every case must be dealt with separately, having regard to the incidents of each one. As, however, the applicants, who were first offenders only, were sentenced to imprisonment in the second division, the time spent in prison pending appeal may count in that sentence, inasmuch as the conditions under which a prisoner is detained pending appeal are almost identical with those of a prisoner in the second division. Therefore, the sentence may run from the date of the conviction.

Applications refused. Sentences to run from the date of conviction.

HERBERT ALFRED BOXALL, SAMUEL HAMMERSLEY AND WILLIAM MARSTON.

Herbert Alfred Boxall, Samuel Hammersley and William Marston.

If the Court reduces a sentence passed on one of several prisoners jointly indicted, it will, in the absence of any reason for discrimination, reduce it in the case of the others.

This was an appeal against sentence, leave having been granted by Mr. Justice Jelf.

The appellants were indicted before Mr. Justice Darling, at

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Herbert Alfred Boxall, Samuel Hammersley and William Marston.

Warwick Assizes on February 17th, for being accessories to a rape. They were found guilty of an indecent assault and sentenced to two years' imprisonment with hard labour.

Craeroft for Boxall and Hammersley (under sect. 10 of the Criminal Appeal Act), who were not present.

Marston, who was not present, was not represented. The appellants were indicted and convicted with a man named Harrison. Boxall and Hammersley were only seventeen at the time the offence was alleged against them, and were only charged as accessories. Harrison had since appealed to the Court (*a*), and the term of his sentence had been reduced to one year.

Laurie, for the Crown: There was a principle involved in this case, because the appellants had been allowed extension of time in which to appeal. It was necessary to see that this privilege was not abused, because prisoners convicted together might agree to put forward one of their number to appeal, thereby restricting to one the liability of having the sentence increased, and then, if the volunteer were successful, the remainder would ask for an extension of time, and appeal upon the ground that what was given to one should be granted to all.

CHANNELL J.: This Court, although not constituted as it is at present, had to consider the case of *Harrison* (*a*), and reduced the sentence in that case because it thought that the learned judge was indignant at the conduct of Harrison, and when he was passing sentence took into consideration circumstances which he, for the purpose of the conviction, told the jury to disregard. Whether the decision of the Court were right or wrong we have no opinion, but we cannot go behind that decision, and it would be wrong not to follow it. We cannot go into the question whether the time for appealing was rightly extended by the learned judge, although we do not suggest that it was not. There is no reason for giving appellants a greater reduction than Harrison received, but their sentences must be reduced to one year's imprisonment with hard labour.

Sentences reduced. Sentences to run from date of conviction.

(*a*) See p. 94, above.

THOMAS BOUCHER.

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Thomas Boucher.

Severity of sentence—The character of previous convictions must be taken into account in sentence.

This was an appeal against sentence, leave having been granted on May 3rd by the full Court.

Appellant was indicted before the Chairman of the Surrey Quarter Sessions at Kingston on April 6th, 1909, for obtaining credit by fraud. He pleaded guilty, and was sentenced to nine months' imprisonment with hard labour.

Appellant in person.

Safford, for the Crown: The appellant was convicted of obtaining credit for food to the value of sevenpence by fraud other than false pretences, under sect. 13 (1) of 32 & 33 Vict. c. 62 (The Debtors Act, 1869). Appellant was only just out of prison when he committed this offence. He had been previously convicted four times for stealing bicycles.

JELF J.: This was not an aggravated fraud; the convictions proved were of a different character. The maximum sentence for the offence is twelve months' imprisonment. The present sentence is too heavy, and must be reduced to three months' imprisonment with hard labour.

Sentence reduced. To run from May 7th, 1908 (*a*).

WILLIAM WARNER.

William Warner.

Deterrent sentences—This Court will not interfere with a sentence governed by a rule laid down in special circumstances.

Whether under 8 *Ed.* 7, *c.* 59 (*the Prevention of Crime Act*, 1908), *two consecutive sentences, each of a less term than five years, but together amounting to five years or more, may be converted into "preventive detention,"* quære.

This was an appeal against sentence, leave having been granted by Mr. Justice A. T. Lawrence.

Appellant was indicted before the Chairman at the Middlesex

(*a*) See *Elliott*, p. 171, above.

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William Warner.

Sessions on April 5th, 1909, for housebreaking. He pleaded guilty, and was sentenced to seven years' penal servitude, to be followed by three years' police supervision.

Appellant in person.

Purcell, for the Crown: Appellant was sentenced on two indictments to three and a half years' penal servitude in respect of each, to run consecutively. He had seven previous convictions. The sentence, though severe, was in accordance with a rule laid down years ago by Sir Ralph Littler of punishing with exceptional severity housebreaking in Middlesex, inasmuch as the small householders there, from the unavoidable insufficiency of police, can only be protected from London housebreakers by deterrent sentences, and experience had proved that the rule was efficacious.

CHANNELL J.: We think that we cannot interfere with the sentence; it is doubtless a severe one, and might possibly have been passed in a better form. We hope that the division of the sentence will not deprive the appellant of the advantage of "preventive detention" under the Home Secretary's order. That only applies in cases of sentences of five years and upwards, and though this sentence is in form two sentences of three and a half years each, yet it is virtually one of seven years. There is no principle on which we can reduce this sentence. This man is evidently a most dangerous criminal.

Appeal dismissed.

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Alfred Sneasby.

ALFRED SNEASBY.

Appeal against sentence after plea of guilty.

If, owing to a plea of guilty, the judge at the trial has not all the facts before him, this Court may interfere.

This was an appeal against sentence, leave having been granted by Mr. Justice A. T. Lawrence.

Appellant was indicted before Mr. Commissioner Rentoul at the Central Criminal Court on March 24th, 1909, for stealing lead. He pleaded guilty, and was sentenced to twelve months' imprisonment with hard labour.

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Sneasby.

Burnie for the appellant (under sect. 10 of the Criminal Appeal Act), who was present. Appellant was convicted with two other men, Williams and Newman. Williams received three years' penal servitude at the trial, it being thought by the learned Commissioner that he was the ringleader. On May 3rd, 1909, the Court of Criminal Appeal reduced Williams's sentence to eighteen months' imprisonment with hard labour (*a*), on the ground that there was nothing to shew who was the ringleader. The learned Commissioner imposed on Sneasby and Newman the same sentence, although Newman had been previously sentenced to five years' detention in a reformatory, whereas there was nothing against the appellant, who had been in the service of his employers for ten years. There was very little evidence against Sneasby on the depositions, and Newman took a much more active part than Sneasby. Newman acted independently of Sneasby; but only one small act was done by Sneasby apart from Newman.

Roome, for the Crown: Sneasby, the appellant, held a position of trust. When he was given a good character by his employers, they did not know how they had been robbed by him. The Court of Criminal Appeal had held that it would not reduce sentences unless a strong reason was shewn.

Channell J.: We think we can reduce the sentence in this case. One is more reluctant to interfere where the judge has heard the whole case, but here the appellant pleaded guilty. A question was raised at the trial as to which of the three men was the worst. Williams was thought to be the instigator, and received a sentence which was afterwards reduced. We have to deal with this case upon the footing of what sentence the appellant ought to receive, and not what Williams has received. It appears that appellant was tempted by Newman, and if the learned Commissioner had had all the facts before him, he would probably not have passed the sentence he did. This case must be treated *de novo*, and the sentence reduced to six months' imprisonment with hard labour.

Sentence reduced.

(*a*) See p. 156, above, and cf. *Boxall, &c.*, p. 175, above.

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Richard Lewis.

RICHARD LEWIS.

This Court has no jurisdiction to interfere with the discretion of a judge in discharging a jury without verdict and recommencing a trial, but that discretion ought not to be exercised merely because the witnesses for the Crown are not ready.

Charlesworth (*a*) *and* Winsor *v.* R. (*b*) *followed.*

This was an appeal against conviction on a certificate granted by the judge at the trial.

Appellant was convicted before the Chairman at the County of London Sessions on April 30th, 1909, of obtaining money by false pretences, and sentenced to two years' imprisonment with hard labour.

Roome for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. The original date of the trial was April 7th, but April 20th was finally fixed by arrangement for the hearing, and on that day the case for the prosecution began. Witnesses were called, and then, owing to the absence of other witnesses, the prosecution asked for an adjournment. The application was opposed but granted, and the jury were discharged. On April 30th the trial was recommenced with a new jury and the appellant convicted. When the adjournment was asked for on April 20th there was sufficient evidence to go to the jury, and therefore the learned Chairman had no right to discharge the jury, because there was no necessity to do so. See Archbold, Criminal Pleading, 23rd ed., p. 223; Roscoe, Criminal Evidence, 13th ed., p. 188.

[Jelf J.: The prosecution might have been instructed to put forward all the charges, and those in respect of which an adjournment was asked for in order to bring witnesses in support, may have been the most important of all.

(*a*) (1861), 31 L. J. M. C. 25; 1 B. & S. 460; 18 Jur. N. S. 1091; 5 L. T. 150; 9 W. R. 842; 9 Cox C. C. 44; 2 F. & F. 326; Q. B.

(*b*) (1866), L. R. 1 Q. B. 289, 390; 35 L. J. M. C. 121, 151; 7 B. & S. 490; 12 Jur. N. S. 561; 14 L. T. 567; 14 W. R. 695; 1 Cox C. C. 327; Q. B. and Ex. Ch.

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CHANNELL J.: The whole difficulty is whether the fact that the witnesses were not there ought not to have been found out before the appellant was given in charge of the jury on April 20th. Surely the judge has a discretion in the matter of discharging the jury.]

Counsel referred to *Charlesworth* (*a*) and *Winsor* v. *R.* (*b*), and to Cockburn C.J.'s judgment, L. R. 1 Q. B. D. at 309.

Raymond Asquith, for the Crown, was not called on, but stated that the fact that the witnesses for the prosecution were not forthcoming on April 20th was not due to any carelessness on the part of the Treasury.

CHANNELL J.: The question in this case is one of law, and it is whether the appellant was entitled to say at his trial on April 30th that the jury were improperly discharged on April 20th. That question has been before the Courts in the most solemn form possible, namely, on a writ of error. In 31 L. J. M. C. at p. 25, the judgment of Mr. Justice Crampton in *Conway* (1845), 7 Ir. Law Rep. 149; 1 Cox C. C. 210, is set out. That judgment, which was a dissenting judgment, was approved in *Charlesworth* (*a*) and *Winsor* (*b*). It lays down the law in plain terms, namely, that the discharging of a jury is entirely within the discretion of the judge. It is, according to Mr. Justice Crampton's judgment, a practice which has grown up gradually, which is justified in many cases in which it would not have been suffered in earlier times. The same judgments shew that the rule as to *autrefois acquit* and *autrefois convict* cannot be urged here, because the appellant was never in peril on April 20th. The established law to the effect that the discharging of the jury is in the discretion of the judge, and that his exercise of the discretion is not subject to review, is not affected by the Criminal Appeal Act, 1907, and therefore we have no jurisdiction to deal with it. However, although we cannot say it judicially, we would like to intimate that the judge's discretion in this case appears, if we rightly understand the facts, to have been exercised in a way different from that in which it has been our individual practice to exercise it. A jury should not be dis-

(*a*) See note (*a*), p. 180.
(*b*) See note (*b*), p. 180.

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charged in order to allow the prosecution to present a stronger case on another trial. That is the rule on which judges have acted and on which we think we ought to act, but we have no jurisdiction to deal with this matter.

Appeal dismissed. Sentence to run from April 6th, 1909.

George Bennett.

GEORGE BENNETT (*a*).

Counsel's statement in lieu of transcript of shorthand note.

This was an appeal against conviction, leave having been granted by the full Court.

Appellant was convicted before the Chairman at Cardiganshire Quarter Sessions on April 8th, 1909, of breaking and entering a shop, and sentenced to five years' penal servitude.

Douglas Lewis for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. The prosecutor's wife locked up the shop and left it secure the night before Christmas, 1908. On Christmas morning the shop window was found open and money taken from the till, and various articles of clothing missing. A man named Reynolds met appellant some time afterwards and told him that there was a man in the place where the offence was committed spending a lot of money just after Christmas. Appellant said: "I am the man. I had quids then. I got them from a shop." A witness named Thomas Williams said he met appellant at 5.50 a.m. on Christmas morning, with a sack on his back, coming from the direction of the house robbed, and going towards the hayloft where he slept. He knew appellant and spoke to him, but got no reply. Some of the goods which were also taken from the shop were found in a hayloft where appellant slept, but a great number of tramps also slept there, so that the evidence was not absolutely conclusive. The sentence, too, was excessive. Although appellant had suffered several terms of imprisonment, this was the first term of penal servitude, and this was an opportunity of doing something to standardise sentences.

David Rhys, for the Crown, was not called on.

(*a*) See p. 152, above.

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CHANNELL J.: Leave to appeal was given in this case, because no shorthand note of the trial was forthcoming. We have, however, had the counsel before us who appeared at the trial for appellant, and we are satisfied that there is no ground for appeal. Appellant has had eight previous convictions, and the evidence is conclusive against him. Nor, in view of the number of previous convictions, is the sentence excessive.

Appeal dismissed. Sentence to run from May 7th, 1909.

MICHAEL McGERLYNCHIE (*a*).

Michael McGerlynchie

Fresh evidence—The Court will not, as a rule, permit a witness who could have been called at the trial, but was not, to be examined on the appeal.

This was an appeal against conviction, leave having been granted by the full Court in order that further evidence might be called.

Albert Rouse, examined by *Chapman* for the appellant, said:—On February 15th, 1909, I was in Manningham Lane, Queen's Road, Bradford, at about 2 p.m. I saw a man named Firth whom I had known since July, 1908. He asked me to help him with a bundle. I said I was going somewhere and I could not. I saw appellant and called out to him that there was a job for him if he liked to have it.

Cross-examined by *C. Mellor*, for the Crown: Firth was five feet six inches in height, with a ginger moustache. I have spoken to Firth once before.

Counsel referred to Walton J.'s judgment in *Osborne*, 72 J. P. 473; 1 Cr. App. R. 144 (1908). If Rouse's evidence had been before the jury they must have been influenced in appellant's favour.

Charles Mellor, for the Crown, was not called on.

CHANNELL J.: The evidence given only contradicts the evidence for the appellant already before us. It is obvious that appellant

(*a*) See p. 141, above.

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knew of this witness at the time of the trial and he refrained from calling him, and took his chance of getting off without his assistance. The Court had no idea of this when they gave leave to have the witness called. It would be the worst possible precedent to set up to give a prisoner a double chance.

Appeal dismissed. Sentence to run from May 7th, 1909.

Charles Raybould.

CHARLES RAYBOULD.

"*Habitual criminal*" *within* 8 *Ed. VII. c.* 59, *s.* 10 (2) (*Prevention of Crime Act*, 1908).

A conviction on three indictments is not (semble) *three convictions within that section.*

Whether a more severe sentence should be passed after a previous conviction depends on the nature of each offence (*a*).

This was an appeal against sentence, leave having been granted by the full Court on May 3rd (on appeal from an order of A. T. Lawrence J., refusing leave and legal aid).

Appellant was indicted before the Chairman at West Kent Quarter Sessions on April 7th, 1909, of larceny. He pleaded guilty, and was sentenced to five years' penal servitude.

Appellant in person.

Duncan Wallace, for the Crown: Appellant was convicted of stealing the contents of a lady's hand-bag, which was left in a school-house. The value of the articles stolen was £4 : 10*s*. Appellant had been once previously convicted on three separate indictments for housebreaking. The detective who gave evidence made a statement with regard to the appellant being suspected of many housebreakings. When appellant was stopped, he having run away, he offered to go back and shew where he had hidden the bag. Probably the Court was influenced by a detective's statement that since appellant's arrest on the previous occasion a series of housebreakings in that neighbourhood had ceased.

Channell J.: The Chairman, in sentencing appellant, said in open Court that he regarded him as a habitual criminal. The

(*a*) Cf. *Boucher*, p. 177, above.

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Chairman has reported to us that he passed this severe sentence because he had in his mind the Prevention of Crime Act, 1908, which comes into force this year. Under that Act, the Home Secretary has power, on any sentence of five years or more, after three years have been served, to commute the remainder to preventive detention. There is a clause in the Act making this course possible in sentences passed at the present time. We think the Chairman was entitled to take that Act into consideration; but on looking into the matter, we do not think there was any justification for regarding the appellant as a habitual criminal. A habitual criminal is defined by the Act as being a person who has been three times previously convicted, and who is leading a life of dishonesty. Appellant was once before convicted on three indictments, but it is not at all clear to us that that amounts to three convictions within the meaning of the section; and even if it did there was no proof that he was leading persistently a dishonest or criminal life, which is a more important part of the definition of a habitual criminal than the three convictions. He then received twenty-one months' imprisonment with hard labour. Some people think that on a second conviction a more severe sentence must necessarily be passed. That is not universally a right principle. The nature of the last offence must be considered to see whether it is so or not. The sentence must be reduced to fifteen months' imprisonment with hard labour.

Sentence reduced.

BEFORE

MR. JUSTICE CHANNELL, MR. JUSTICE JELF AND MR. JUSTICE COLERIDGE.

HENRY GORMAN.

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Severity of sentence.

Proof of intent in cases of wounding with intent to do grievous bodily harm—It is impossible to "standardise" sentences in such cases.

This was an appeal from the order of A. T. Lawrence J. refusing leave to appeal against sentence, and legal aid.

The applicant was convicted before Mr. Justice Walton at Liverpool Spring Assizes, May 1st, 1909, for wounding with intent to do grievous bodily harm, under sect. 18 of 24 & 25 Vict. c. 100 (the Offences Against the Person Act, 1861), and sentenced to fourteen years' penal servitude. The material facts shewn in evidence were that the applicant, who was a dock labourer, having met his wife, from whom he had been judicially separated, in the street, followed her up, and got to the place where she lived, and then met her and stabbed her three times, and left the knife sticking in her back. He was then immediately arrested. Two of the wounds were about one inch in depth, but it was not necessary to take the victim's depositions, and she recovered in three weeks. The applicant pleaded not guilty at the trial, he was undefended, and stated that he was so drunk that he had lost all recollection of the circumstances.

N. W. Sibley for the applicant, who was not present. The sentence was one of extreme severity. It exceeded any sentence passed for an analogous offence mentioned in the Criminal Appeal Reports, whether for attempt to murder (*Bradley*, 2 Cr. App. R. 124; 1909) or for manslaughter (*Gylee*, 1 Cr. App. R. 242; 73 J. P. 72; 1908; *Donovan and Hurley*, 2 Cr. App. R. 1; 1909), and was twice the length of the longest sentence passed for inflicting grievous bodily harm with intent which the Court had

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not interfered with. (*Carpenter*, 1 Cr. App. R. 210; 1908.) The applicant was only twenty-five years old, and had not been previously convicted of any serious offence or on indictment.

[Channell J.: That may affect crimes of dishonesty, but not of violence. We cannot judge one case of fact by another.

Jelf J.: He has been convicted three times of assaults on the police.]

In *Sidlow* (1 Cr. App. R. 28; 72 J. P. 391; 24 T. L. R. 754; 1908) the Court had laid down the conditions of its standardising a sentence, and the learned judge in the case before the Court had, although intent was charged, directed the jury that people are taken to intend the consequences of what they do, and therefore he must have proceeded upon wrong principles. This would cause the condition to arise. Counsel referred to the direction of Bramwell B. in *Cox* (1859), 1 F. & F. 664 (where the headnote says: "On an indictment for wounding with intent the *actual* intent must be proved"); and of Alderson B. in *Wheeler* (1844), 1 Cox, C. C. 106; 3 Russell on Crimes, 6th edn., Appendix A. p. 684 (*a*).

[Channell J.: I doubt the headnote of that decision of Lord Bramwell. Intent can be inferred from the nature of the act.

Lord Coleridge J.: There were three separate stabs.]

One, however, was not even a wound technically. (*Moriarty* v. *Brooks* (1834), 6 C. & P. 684; *Beckett* (1836), 1 Moo. & Rob. 526.) Neither was as deep as in the wound in *Truss*, 2 Cr. App. R. 69 (1909), where only a sentence of eighteen months' hard labour was passed. Finally, this Court has ruled that it is a serious flaw in the summing-up if it does not put the case for the prisoner as carefully as the case for the prosecution. (*Warner*, 1 Cr. App. R. 227; 73 J. P. 53; 25 T. L. R. 142; 1908; *Keating*, 2 Cr. App. R. 61; 1909.) The prisoner pleaded drunkenness in alleviation, and this went entirely to the issue, as the

(*a*) Where it is added: "This case is evidently not reported with accuracy."

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intent was charged (*Meade*, (1909) 1 K. B. 895; 2 Cr. App. R. 54; 25 T. L. R. 389; W. N. 62), but the learned judge did not advert to this in his summing-up.

CHANNELL J.: As to the suggestion of standardising sentences, it is quite impossible to lay down any standard as to what is a proper punishment for the offence of wounding with intent to do grievous bodily harm—as little as in cases of manslaughter, the most difficult of all. The question depends on the circumstances attending each particular case. In this case it appears to the Court that if there is a standard it has been somewhat raised, but very properly so. Leave to appeal must be refused.

Applications refused.

Solicitor for Appellant: *J. A. Howard-Watson*, Liverpool.

William Beach and Arthur Morris.

WILLIAM BEACH AND ARTHUR MORRIS.

On an indictment for riot (alleged to be by three persons at least) at common law, less than three persons may be convicted.

Applications for leave to appeal against conviction, referred to the full Court by Jelf J. (Appeals on a point of law by both appellants were also in the Summary List for the day and were dismissed.)

Appellants were tried before the Recorder at the Birmingham Quarter Sessions on May 1st (with another man, who was acquitted) for riot on January 5th, and were sentenced on May 5th, Beach to eight months' and Morris to twelve months' imprisonment with hard labour.

J. G. Hurst, for *Beach*, who was not present. For some time there had been a series of riots or "rows" in a low-class quarter of Birmingham, originating out of a personal quarrel. On January 5th there was a riot of the sort about midnight, and an attempt to enter and wreck the house of one Jones. Revolvers were fired at his windows. Only the three defendants were identified out of nine or ten who were alleged to be rioting; the others were not alleged to have taken part in the actual tumult, but were seen "lounging over a wall" when the assault took place, and so could not have been guilty of any offence. Everything depended on the identification, purely a question

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of fact. Beach was seen coming out of a public-house at 11 p.m., when he went to a friend's house where he stayed till 12.10 midnight, and where he was seen by three or four people while the rioting was going on. On the other hand, every single witness for the prosecution, and there were nine or ten, identified him as being present by a bandage which he wore over a wound in the head which he had received three or four days before.

[CHANNELL J.: The learned Recorder in his report says that it is an entire mistake that the identification proceeded on the bandage.]

It is clear that these witnesses did, in fact, identify—though perhaps unconsciously—this man by his bandage. Now the policemen themselves swore that at 12.10 he was not wearing a bandage; that the suggestion that he should put on his bandage was made by the police themselves, and that his wife searched for it and found it in his house in their presence. One policeman, Sergeant Thomas, it is true, said he did not remember any bandage at all. The learned Recorder ought to have pointed out to the jury that the question of the bandage was material to the correctness of the identification—it went directly to the point whether appellant was present at the riot at all. In other words, the question was whether he was there or elsewhere between 11 p.m. and 12.10 midnight. Now, if he took the bandage off—it was certainly off at 12.10—he must have done it to avoid identification.

[JELF J.: It might have come off in a scuffle.]

No, it is actually found by his wife, in the presence of the police, in a drawer.

[CHANNELL J.: Two witnesses distinctly identify him, and say they know nothing about any bandage.]

Every single witness for the prosecution said he had on some bandage that night. Some of these persons had a feeling against the appellant, owing to local quarrels. No one alleges that he was shooting; he had been in one situation for fourteen years and had never been concerned in these local "rows" before. As for the policeman who identified him, the jury probably disbelieved him, as the man they acquitted was also identified by him. There

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was no evidence that any one was struck. If, in fact, appellant was not wearing a bandage on the night in question—for which the evidence was very strong—that would go straight to the credit of all the witnesses, and the learned Recorder ought to have insisted upon it more than he did.

E. A. Parry, for *Morris* (under sect. 10 of the Criminal Appeal Act), who was not present. The case of this applicant is similar to that of the other: the identification is too weak for his *alibi*. The constable who identified him was the one who identified the third defendant, who was acquitted. This was a local quarrel in which many neighbours were mixed up, and there was much feeling, so that, perhaps, the only other witnesses, the two women who identified, were biassed. At the trial his sister and he swore that on the night of the riot he was at the bedside of her dying husband.

[Channell J.: But neither at the time of arrest nor at the police-court did he say where he was at the time of the riot.

Jelf J.: Nor, at the trial, did either of them say at what hour.]

Secondly, to make a "riot" there must be three *active* persons; the third being a mere onlooker is not enough.

[Channell J.: It was taken for granted throughout the trial that there was a "riot" in the legal sense.

Jelf J.: Two, and perhaps three, revolvers were fired.

Lord Coleridge J.: There was direct evidence that Morris fired.]

Channell J.: There was clear evidence in this case on which the jury *could* find a verdict of guilty, and we cannot re-try the case. As to the point of law suggested, on the indictment in this case which charged a riot with other persons unknown, there is no doubt that two persons only may be convicted of rioting with others. There was ample evidence that more than three persons took part in the riot. As the business of the Court has delayed this hearing, the convictions may run from the date the case would have come into the list.

Applications dismissed.

Solicitor for appellant Beach: *J. Hall-Wright*, Birmingham.

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Frank Malvisi.

FRANK MALVISI.

Fresh evidence of alibi—*No opportunity of calling witnesses at the trial.*

J. G. Hurst, for the appellant, said that the appellant was convicted of larceny from the person on April 27th before the Assistant-Recorder at the Birmingham Quarter Sessions, and sentenced to eighteen months' imprisonment with hard labour. He was charged with having gone behind two ladies in the street, striking one and snatching from her a satchel. The offence was committed at 8.30 p.m. on April 23rd. The appellant's complaint was that, owing to the celerity with which the proceedings were carried through, he was unable to call the evidence as to an *alibi* which otherwise he could have called, and which he now desired to call. Nothing was found on his person, and nothing was found in his house upon search. Three witnesses had given signed proofs, and there were three more. The appellant had not appealed within the proper time from want of funds. He was an Italian.

CHANNELL J.: There ought to be leave to bring up the witnesses, and their names must be given to the Court. Here the circumstances are quite exceptional. The appellant, a foreigner, was tried three days after the offence had been committed, which did not give him the opportunity of calling witnesses which he would otherwise have had. No order would be made as to bringing up the ladies. It might become necessary on the hearing of the appeal to adjourn the case and bring them up. Legal aid would be granted on the condition that the officer of the Court was satisfied that no fund was available. In such case counsel and solicitor would be assigned.

Applications granted.

Solicitor for the applicant: *J. Hall-Wright*, Birmingham.

JOHN O'BRIEN.

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John O'Brien.

"Incorrigible rogue"—Severity of sentence.

The appellant, who appeared in person, appealed against an order of Jelf J. refusing leave to appeal against conviction, and legal aid. He was sentenced to four months' imprisonment with hard labour by the Deputy-Chairman of the County of London Sessions on May 13th, for the offence of begging and of being an incorrigible rogue. He contended that on his first conviction he had been wrongly sentenced on an alleged previous conviction of fourteen days' imprisonment at Tower Bridge Police Court, and, consequently, all subsequent convictions had been based upon a conviction which, in fact, had never taken place.

CHANNELL J.: In this case the prisoner has no right of appeal against his conviction, but only against his sentence. He was not convicted on indictment. The only question is that of his sentence. He had a right of appeal to the Quarter Sessions which he might have exercised, when all the evidence could then have been gone into. He was then sentenced to four months' imprisonment, having been convicted of precisely the same offence as that for which he had previously been sentenced to nine months' imprisonment, which had been reduced by this Court to one of three months' (*a*). We are not here as legislators, and we can only administer the law as we find it, but it does seem somewhat hard to have to pass such sentences. These sentences cannot, however, be passed unless the same offence has been committed before. In this case the appellant disregarded the sentence of three months which he had just served and immediately repeated the offence. The Chairman, in our opinion, rightly sentenced him to a term of four months. We have got to administer the law, not to make it. The sentence must stand.

Applications dismissed.

(*a*) Reported as *Edwards*, p. 79, above.

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—
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JOHN WARREN.

Corroboration of an accomplice's evidence must be material—The slighter it is, the more distinct should be the caution to the jury as to it—A defendant on trial should be informed of his right to give evidence.

Appellant was convicted on May 8th, at the Middlesex Sessions, before the Chairman, of having received a stolen pony and cart, harness and other articles, and sentenced to three years' penal servitude. The property was stolen from a stable in London, and sold by the thief to one Smith, who, before this trial, had been convicted of receiving the stolen goods. Smith implicated appellant to the police and gave evidence against him, stating that appellant and the thief had put the horse, &c. in his (Smith's) stable, and that appellant afterwards told him they had a "dish" (*i.e.*, stolen goods) for him, and that he and appellant took the horse and cart by road to Birmingham, hawking oranges on the way. There appellant put up the horse and cart, as Smith was too drunk.

C. L. Attenborough, for appellant (under sect. 10 of the Criminal Appeal Act), who was present. Appellant complained that he had been convicted on the evidence of Smith, an accomplice, of which there was no real corroboration, and that the direction of the learned Chairman was inadequate. The only corroboration of Smith's statement was that of an ostler at Birmingham, who said that appellant had put up there with Smith, who had the property in his possession. This appellant had never denied. His defence from the first had been that he was selling oranges from the cart with Smith, at Birmingham, as his servant, and had no possession of the stolen things or knowledge that they were stolen. The corroboration was not of a matter implicating appellant or inconsistent with his innocence.

Bickmore, for the Crown, contended that the direction did refer to the corroborative evidence. The amount of corroborative evidence required is such as would tend to identify the person charged with the alleged offence. He was present at the sale of the stolen property, and he immediately leaves and goes into the country with Smith, who has the booty. The onus was on him to shew his innocence. There was considerable corroboration.

Channell J.: This conviction must be quashed. The rule is now quite clear that the evidence of an accomplice must be corroborated.

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It is not sufficient that the accomplice has said something which is true. The Chairman did refer to the fact that this was the evidence of an accomplice. If there had been any clear evidence of corroboration we should have thought that what the Chairman said would have been sufficient. But it was so slight that it required very careful pointing out by him. He did not do it as fully and clearly as he ought, having regard to the very slight corroboration. Further, the prisoner had not been told he had a right to give evidence. He ought to have been so told, though I am not sure that we should have quashed the conviction on that ground alone.

Conviction quashed.

Frank Nicholson.

FRANK NICHOLSON.

Fresh evidence—Magistrates ought not to discourage defendant's calling witnesses before them.

Appellant was convicted on April 27th, before the Chairman of the County of London Sessions, of having stolen a quantity of linen, after a previous conviction for felony, and sentenced to twelve months' imprisonment with hard labour. He had been sent with the parcel to a laundry in the Edgware Road. A few days later a man, spoken of as "the American," called at the laundry in company with appellant and took away the linen. The "American" disappeared, and the linen had not been recovered. The defence was that appellant was not acting in concert with the other man, but had met him in a neighbouring public-house, and that the latter had asked him to shew him the way to the laundry; that he did not go into the laundry until he was sent for, and that "the American" paid the bill and took the things away. His application for leave to appeal against conviction was refused by A. T. Lawrence J., but on May 7th leave had been granted by the full Court, which also allowed him legal aid and the right of calling two new witnesses.

Gundry, for the appellant (under sect. 10 of the Criminal Appeal Act), who was present, said the appellant had been convicted of stealing linen, acting in concert with an American. It appeared that the appellant had two witnesses at the trial, who, on being

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told they were not wanted, went away. The appellant thought they were there, and called them.

Tom Jamieson and *Violet Jamieson*, his wife, gave evidence to the effect that they were present in a public-house in the Edgware Road with the appellant and the "American," when the latter asked the appellant to shew him where the laundry was, from which he had been asked by their landlady—they were both lodging in the same house—to fetch them. They were there on his return, and he had no linen with him.

Cross-examined by *Oliver:* They knew appellant and the "American," as they all lived in the same house; they were not surprised that the "American" should ask appellant if he knew the way to the laundry.

Gundry contended that if these witnesses had been called the appellant would not have been convicted.

Oliver, for the prosecution, submitted that the evidence of these witnesses did not carry the case any further. The summing-up was quite sufficient, and every defence for the appellant had been put forward.

CHANNELL J.: There really was extremely slight evidence against the prisoner. He assisted a man to get hold of the clothes, and if a party to the theft, he was rightly convicted. There is grave doubt whether there was sufficient evidence to go to the jury. The two witnesses were told by some one they were not wanted. It is a most unfortunate thing that in the country, and too often also in London, committing magistrates seem to discourage witnesses for the prisoner when the case is before them. These did come to the sessions; the prisoner thought they were there, and their names were called. They have been called here, and they appear to be respectable persons. If they had been at the trial, the jury would, in all probability, have acquitted the prisoner. The evidence is such that the case comes within the law as to a miscarriage of justice, and the conviction must be quashed.

Conviction quashed.

BEFORE

MR. JUSTICE CHANNELL, MR. JUSTICE JELF, AND MR. JUSTICE BRAY.

MAX COHEN AND LEONARD NELSON BATEMAN.

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Max Cohen and Leonard Nelson Bateman.

Criminal Appeal Act, 1907, *s.* 4 (1).

Grounds on which the Court will hold that there has been "a miscarriage of justice" discussed and considered.

A faulty summing-up is not necessarily a ground for quashing a conviction.

Both appellants, who were present, applied for leave to appeal against conviction and sentence, and had been referred to the full Court by A. T. Lawrence J. The applications were treated as final appeals. Cohen also appealed on a point of law, and asked leave to call further evidence.

Appellants were tried together and both convicted, after a trial lasting four days, before Mr. Justice Ridley at Bristol Assizes on 5th April, 1909, of conspiracy, obtaining money by false pretences, and of fraudulently inducing another to endorse acceptances. The indictment contained ten counts. The first count was for conspiracy to defraud Cook; the second, for obtaining £200 from Cook by false pretences; the third, for conspiracy to defraud Howse; the fourth, for obtaining £250 from Howse by false pretences; the fifth, for obtaining a cheque for £250 from Howse by false pretences; the sixth, for conspiracy to induce Abraham Cohen to endorse a bill of exchange by false pretences (in each case the false pretences constituting the overt acts of the conspiracy); the seventh, for inducing him to do so; the eighth, for inducing Taylor by false pretences to endorse five bills of exchange for £100 each with intent to defraud; and the ninth and tenth varied the charges laid in the second and fourth respectively.

The appellants were both found guilty on the first four and the eighth counts, and were each sentenced to three years' penal servitude.

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The case for the prosecution was as follows:—Before the transactions in question, Bateman had been carrying on business at Bristol in the export woollen trade, and Cohen the businesses of a money-lender, furniture dealer, and printer at Leeds. Bateman came to Bristol in April, 1907; Cohen in May of the same year. At some time during the year they became acquainted (according to Cohen they were related), and decided to enter into partnership in the export woollen trade. In November, 1907, Cohen's accounts were audited by Skinner, a chartered accountant, on behalf of Isaac Young & Co., creditors of Cohen, and a balance-sheet drawn, which shewed a surplus of nearly £12,000. This balance-sheet having been handed by Cohen to Bateman, was produced on 27th January, 1908, to Cook, who was acting as solicitor to Bateman, by the latter with a view to the intended partnership between him and Cohen. Bateman informed Cook that he was worth about £9,000.

On the following day Bateman introduced Cohen to Cook at the latter's office, and instructions were given for the preparation of a partnership deed. The draft deed was approved on January 30th, and Cook instructed to engross it. Early in February, Bateman came to Cook and said Cohen was in temporary difficulties. On February 19th, Bateman and Cohen had an interview with Cook at his office, and in the belief that Cohen's balance-sheet was an honest one, and Bateman's surplus of assets over liabilities was a real one, Cook was induced to lend them £200, as security for which Bateman and Cohen gave a joint promissory note, and the money was handed to Bateman in Cohen's presence. Cohen at first denied his presence at Cook's office on February 19th. Upon the same day, a trade enquiry as to Wilks, father-in-law of Cohen, was despatched from Bateman's business premises. On February 21st a telegram was sent from Bateman at Bristol to Cohen at Leeds: "Very sorry. It's impossible. Send bill of Wilks."

On February 27th Bateman telephoned to Cook proposing a way of raising more money, saying that Wilks would guarantee £500 by bill. Cook then wrote to Bateman setting out the terms of the proposed transaction, to which Bateman replied by telegram of the 28th, "Your letter correct except Wilks's bill to be £286 instead of £500." On February 28th Cohen's nephew, David Cohen, forged the acceptance of Wilks to two bills, for £500 and £286. This, according to David Cohen's evidence, was done at the instigation of Bateman. On March 2nd Bateman called on Cook and

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said he had a bill for £500, and on March 4th, at another interview with Cook, he met Howse, a client of Cook, whereupon Howse was induced by Bateman to lend Bateman and Cohen £250, as security for which Bateman gave a bill for £275 at two months accepted by himself. The false pretences alleged were that Cohen's balance-sheet which was produced was inaccurate, that Bateman's balance which he produced was false, and that the bill for £500 which was given as collateral security was in fact a forgery. On March 7th Bateman had another interview with Cook, when he handed to the latter Cohen's acceptance for £220 as security for Cook's loan of £200. On March 18th the deed of partnership was executed. Cook's suspicions being aroused that something was wrong, he wrote to Leeds on April 7th and made his own investigations into Cohen's money-lending, furnishing and printing businesses. Every facility was afforded by Cohen, and Cook was satisfied that although not very profitable the businesses were genuine. Bateman and Cohen both visited Cook on April 25th, when Cohen said, "We are going to dissolve partnership." Cook replied, "You will want a deed." Cohen said, "We don't want a deed." Cook then said, "What about a partnership account?" Cohen replied, "I am liable for the £786," meaning, as Cook understood, the £500 and £286. Cohen denied this statement. His case was that the bills for £500 and £286 were forged without his knowledge, though his name was on the bill for £500, and that he had given this bill to Bateman in blank in order to renew another bill for £500, the amount due upon which had not then been ascertained. According to Cook's evidence Cohen came to him on May 5th and asked him for how much he would give up the bill for £500. Cohen denied this.

On June 15th Bateman got Taylor, a friend of Bateman, by false pretences to endorse five bills of £100 each, some of which Taylor was subsequently sued upon, and was now paying by instalments. The false pretences alleged were that Cohen was in a good financial position, and was then able and about to put £10,000 in Bateman's business.

At an interview with Cook on June 17th, according to Cook's evidence, Cohen refused to sign certain promissory notes for Bateman unless he was released from Howse's bill. Cohen became bankrupt on September 23rd, and Bateman on November 24th. Cohen's defence was that he was not present on February 19th,

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March 4th, or June 15th, and that Cook's evidence was untrustworthy. Cook had first stated that Cohen was present at his office on March 4th, but, on re-consideration, said it was by telephone from Leeds that he had the conversation. Cohen denied his presence at Cook's office, and called evidence to show it was impossible for him to have telephoned from Leeds as alleged. He maintained that his balance-sheet was not concocted for the purpose of any fraud, but came into existence in the ordinary course of trade, that he was largely indebted to Isaac Young & Co., of Leeds, and at their request Skinner, a chartered accountant, was given access to all Cohen's books and papers, from which he prepared the balance-sheet. This was handed to Bateman by Cohen with a view to the partnership. It was subsequently found to be inaccurate. Some of the securities included in it had decreased in value and some had disappeared, but those which remained still had a substantial value.

Inskip for the appellant Cohen. The grounds of appeal are—

1. The jury could not, on the evidence, have found Cohen guilty on counts two, four and eight. There was absolutely no evidence of false pretences.

[CHANNELL J.: Although Cohen was not present there might be authority to use his balance-sheet.]

2. The learned judge was wrong in holding and stating to the jury that there was in fact a partnership, and that the money went into the account of Bateman & Co. The learned judge said it did not matter how the money was spent since, since the men were in partnership. The learned judge was wrong in saying this was a partnership account.

3. The conduct of the case led to a miscarriage of justice. Counsel was hampered by the learned judge in the conduct of the case. The learned judge's summing-up was wrong upon the facts, and did not state Cohen's case upon a single one of the charges. When counsel was cross-examining Cook the learned judge said he was wasting time, and that every topic he introduced went against his client.

4. The appellant desired to call fresh evidence as to his alleged presence at the interview on February 19th. The evidence was

of the nature of an *alibi*, and was intended to negative the false pretences on that date.

Counsel contended that if Cohen was not present at the interviews on 19th February, 4th March, and 15th June, the prosecution was thrown back on the charges of conspiracy, which could only be inferred from the balance-sheets, from sharing the proceeds and from other interviews. He admitted that if Cohen was present on these dates, he must have known of the frauds.

Cook stated that Cohen was present on February 19th, and produced his call-book with Cohen's name on that date. Cohen, when confronted with Cook's "call-book," in which his name was entered on February 19th, admitted he might have been there then.

[CHANNELL J.: Yes; he gave details. He said he left with Bennett.]

I submit that the entry in the "call-book" is untrue; it was not made at the time.

[JELF J.: Is it not a strong thing to ask us to say this is not the original call-book when it is produced and sworn to by a solicitor of the Court?]

I had no affirmatory evidence then to justify me in attacking the call-book. I have now.

[JELF J.: If he was present it goes a long way to shew he was a party to the fraud.

CHANNELL J.: A clerk may fill up the call-book next day from a memorandum.

JELF J.: You abandoned this at the trial.]

Yes; but I had no evidence to the contrary then.

[JELF J.: This is going beyond anything we have ever done under this Act. Such evidence, if it stands, is conclusive.]

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Cohen never had the money; it was not used for the purpose for which it was ostensibly borrowed, viz., to pay out an execution on Cohen's printing business. This was paid out two days later with money obtained by Mr. Pullan, Cohen's solicitor, from Ingleburv. Cohen said he knew nothing about the transaction with Cook. The learned judge was wrong in saying the money went into the partnership account: it went into Bateman's account, which was carried on in the name of Bateman & Co. Although the draft deed of partnership was approved on 30th January and executed on 19th March, no business was ever carried on, no change was made in Bateman's account at the bank, and no document had been produced suggesting that anything was being done in the partnership. As nothing was ever done in the partnership, no partnership in fact existed.

[Jelf J.: The draft created a partnership if the deed was subsequently executed. It commenced on 1st February.]

The deed was a mere escrow, nothing had been done till the dissolution.

[Jelf J.: Whether they did anything or not, they were bound *inter se*. They could not say they were not partners and afterwards dissolve.]

With regard to the transaction of 4th March, Cook in his evidence first stated that Cohen was present, and subsequently corrected this by saying that he had a conversation with him over the telephone. In his daily sheet he had entered it as an "interview," and when he examined his call-book to verify he could not find Cohen's name, so he came to the conclusion there must have been a conversation over the telephone.

[Jelf J.: Now that there are so many interviews by telephone, the room of the man is the real substantial thing which a man recollects.]

He cannot be found guilty of false pretences unless he was present.

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[CHANNELL J.: I do not care much for dates. The sequence of events is the important thing. Cook is positive a conversation took place, and said he acted upon it. The natural inference is that it happened, but not on that day.]

Cohen knew nothing about the forged bills. He gave the £500 bill to Bateman in blank for the purpose of renewing another £500 bill upon which something still remained due, and so the amount was not filled in.

[JELF J.: Was there evidence upon which he could have been convicted?]

He could have been convicted on the conspiracy count, but there is no evidence of false pretences. This is not a statutory conspiracy, and so the sentence of penal servitude could not be passed, unless defendant was convicted of false pretences. He was convicted on the evidence of Cook that he, Cohen, telephoned to Cook that Cook could take his £200 out of the £500 proposed to be borrowed on the security of Wilks' acceptance for £500. It is true he knew the bills had been forged before the execution of the partnership deed, but he thought they had been destroyed. The learned judge was wrong in assuming that Cohen knew of the forgeries at the time; he ought not to have said, "Cohen must have known, because here is his signature upon it," and "This is in his own handwriting. How can you answer that?"

[CHANNELL J.: Such observations are not in themselves grounds of appeal on misdirection. The only question is whether they are of such a character that the jury would have found differently if such observations had not been made. Juries, as a rule, know their functions.]

Cohen was wrongly convicted on the eighth count, as he was not present. Taylor signed the bills upon the faith of Bateman's balance-sheet, which was the only false representation. The learned judge was wrong in telling the jury there was a partnership. There was in fact no partnership according to sect. 1 (1) of 53 & 54 Vict. c. 39 (Partnership Act, 1890).

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[CHANNELL J.: There was a partnership in fact. Your real complaint is that the learned judge told the jury that there was a partnership, and might have misled them into believing that one partner was liable for the criminal representations of the other. But the jury may be assumed to have sufficient intelligence not to believe anything of the sort.]

There was no evidence fit to go to jury on the false pretences. The learned judge was wrong in telling the jury that because Cohen's name was on one of the bills endorsed by Taylor, "of course he was a party to it." In his summing-up the learned judge never put fairly the case for the defence. In not a single particular was Cohen's defence put to the jury. The learned judge never suggested that there was even a possible defence. This constituted a miscarriage of justice, as it is impossible to say what the jury might have found, if the learned judge had summed up fairly. It is a "miscarriage of justice" within the section if the judge does not fairly put a prisoner's case to the jury, and if by his conduct of the case and summing-up he tells the jury that the prisoner has no defence, without explaining what his defence is, whether good or bad in his opinion. The fact that this Court thinks a verdict of "guilty" right does not get rid of what was a "miscarriage of justice."

[CHANNELL J.: I do not think that is the correct view of a miscarriage of justice under sub-sect. 1 of sect. 4 of the Act. Misdirection is no ground for setting aside a conviction, unless there is a substantial miscarriage of justice.]

Bulloch, for the appellant Bateman (under sect. 10 of the Criminal Appeal Act), contended that the latter had not had a fair trial. In the course of the trial he ceased to be represented by counsel or solicitor, and defended himself. When giving his evidence in chief he was constantly interrupted by the learned judge, who, after the appellant had been for some time giving evidence, quite intelligibly and to the point, said to the prisoner: "You have been three-quarters of an hour talking to us now, and we have got precious little out of it. I can't allow the time to be wasted like this, although you are a prisoner on trial."

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[CHANNELL J.: The learned judge unfortunately always seems to interfere when we are getting to anything material. He appears to have been referring to what had been said previously, and not to the last words appearing on the shorthand note.]

The learned judge made further interruptions. He exclaimed: "Look at the clock." Bateman said: "You must agree with me I must prove my innocence." The learned judge retorted: "I must try to get your case properly to the jury. Go on. It is quite impossible to make head or tail of anything you say. Go on, please, I can't stop you." On the prisoner proceeding, the learned judge said: "If that's the best you can do it is very bad. Now try to put it a little better, so that we can understand it." The result of these interruptions was to dishearten the prisoner, and to bring his evidence to an abrupt close. When Bateman was being cross-examined by counsel for the prosecution, the learned judge intervened and questioned him as to what became of the 200*l.* borrowed from Cook. "You told him you wanted to pay a debt," asked the learned judge. "I didn't say it," replied Bateman, "Max Cohen said it. Max Cohen was with me; I didn't do all the speaking myself." "I did not say you did," retorted the learned judge; "I think one as bad as the other." With regard to the forged bills, counsel contended that David Cohen's story that he had forged Wilks' acceptances at Bateman's direction was a pure concoction, fabricated to relieve Max Cohen and to throw the blame on Bateman. Because David Cohen said he had been thrashed—which had not been contradicted—the learned judge had assumed that his evidence as to the forgery was true, though the thrashing was itself a part of the story and could not well be a matter as to which Bateman could supply any evidence. Intrinsically the story of the alleged forgery was absurd and improbable, and Bateman's subsequent conduct was inconsistent with knowledge on his part that a forgery had taken place. Moreover, the story of the alleged forgery in its original form, as given before the magistrates, was inconsistent with the evidence of other witnesses for the prosecution at the trial. It was doubtful whether the bills were in fact forged at all, but it did not lie on Bateman to shew whether they were or not. He received them innocently.

Bateman was prevented at the trial from stating clearly his

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account of material transactions. He has now prepared a statement (part of which counsel read), and contends that his balance-sheet was correct. He makes various material allegations, as, for instance, that stock to the value of several thousands of pounds had been sold at a serious loss.

[CHANNELL J.: We are not sure that the learned judge was not right in saying that the head and front of the whole thing was these two balance-sheets.]

The learned judge improperly excluded evidence by refusing to allow Bateman to ask the witness Munden about the valuation of his stock.

[CHANNELL J.: The balance-sheet was especially in the mind of the learned judge. I do not think he would have stopped evidence as to this.]

May I put appellant in the box?

[CHANNELL J.: It is perfectly clear that the balance-sheet was not right. We cannot allow the witness to be recalled. He has had every opportunity of explaining the figures. It is not the practice of this Court to allow a witness to be recalled in such circumstances.]

The learned judge took upon himself the responsibility of telling a witness not to produce a letter called for by appellant.

In Cook's case there was no false pretence. Bateman's statement of his affairs was not made for the purpose of the advance of £200, but merely for the proposed partnership. Credit was not given on the faith of Bateman's position, but on that of Cohen's. Bateman was as much deceived by Cohen as any one else, and lost his money to him. There was evidence that at this time Cohen enjoyed a good reputation. It was all the circumstances in combination which operated on the mind of Cook.

As to the transaction with Taylor there is no satisfactory evidence that Taylor relied on the false pretences set out in the indictment.

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Bateman did not have a fair trial. It has been laid down by Sir Edward Coke that where a prisoner is undefended the judge is of counsel for him (*a*). In this case the learned judge took upon himself the responsibility of excluding evidence, in consequence of which the prisoner lost his legal rights as to the conduct of the trial itself.

Weatherly, for the Crown, was not called upon.

CHANNELL J.: We have had an opportunity of carefully discussing this case, and we have arrived at our conclusion. Under the statute only one judgment is delivered, and we have, therefore, put into writing our judgment upon the construction of sect. 4 (1) of the Criminal Appeal Act.

Having read the section, the learned judge read the following judgment: "This section has been considered in almost all the cases which have come before this Court, but these precedents are of little use in subsequent cases because of the varying circumstances of each particular case. Although, therefore, the principle is quite clear, we desire to express it again. Taking sect. 4 with its proviso, the effect is that if there is a wrong decision of any question of law the appellant has the right to have his appeal allowed, unless the case can be brought within the proviso. In that case the Crown have to shew that, on a right direction, the jury *must* have come to the same conclusion. A mistake of the judge as to fact, or an omission to refer to some point in favour of the prisoner, is not, however, a wrong decision of a point of law, but merely comes within the very wide words 'any other ground,' so that the appeal should be allowed according as there is or is not a 'miscarriage of justice.' There is such a miscarriage of justice not only where the Court comes to the conclusion that the verdict of guilty was wrong, but also when it is of opinion that the mistake of fact or omission on the part of the judge may reasonably be considered to have brought about that verdict, and when, on the whole facts and with a correct direction, the jury might fairly and reasonably have found the appellant not guilty. Then there has been not only a miscarriage of justice but a substantial one, because the appellant has lost the chance which

(*a*) 1 Institutes, 178.

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was fairly open to him of being acquitted, and therefore, as there is no power of this Court to grant a new trial, the conviction has to be quashed. If, however, the Court in such a case comes to the conclusion that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no miscarriage of justice, or at all events no substantial miscarriage of justice within the meaning of the proviso, notwithstanding that the verdict actually given by the jury may have been due to some extent to such an error of the judge, not being a wrong decision of a point of law."

We have got to apply those principles to the present case, the facts of which are complicated, and of some difficulty. We have two prisoners each seeking to throw the blame upon the other. The natural conclusion is that each party is to blame, but in each case of the kind it is necessary to be extremely careful to see whether that apparently natural conclusion is the right one in the particular case. That part of the evidence which affects the other party is probably correct, and explains his guilt. How far each is right in excusing himself, and how far his evidence hits the other, is another question. Here each tries to throw the blame upon the other. The learned judge is said to have interfered improperly in the conduct of the case, and not to have put it fairly to the jury, and not to have stated the law properly. The latter would be fatal unless the case came within the proviso of the section. The other observations of the learned judge only become grounds for appeal if they have in fact caused substantial miscarriage of justice. In our view, a judge is not only entitled, but ought, to give the jury some assistance on questions of fact as well as on questions of law. Of course, questions of fact are for the jury and not for the judge, yet the judge has experience on the bearing of evidence, and in dealing with the relevancy of questions of fact, and it is therefore right that the jury should have the assistance of the judge. It is not wrong for the judge to give confident opinions upon questions of fact. It is impossible for him to deal with doubtful points of fact unless he can state some of the facts confidently to the jury. It is necessary for him sometimes to express extremely confident opinions. The mere finding, therefore, of very confident expressions in the summing-up does not shew that it is an improper one. When one is considering the effect of a summing-up, one must give credit to

the jury for intelligence, and for the knowledge that they are not bound by the expressions of the judge upon questions of fact.

No doubt here the learned judge did express himself very strongly. But on the main question we think him right. We think the balance-sheets were incorrect. We all think that on some points the learned judge did not put the prisoners' cases as he ought to have put them. Mr. Inskip has said that he could not say that on the charges of conspiracy there was not evidence that Cohen was guilty, but he did say that there was no evidence of false pretences, and therefore the sentence of three years' penal servitude was not justified. In our opinion, on all the counts of the indictment there was ample evidence for the jury, and it is impossible to say that their verdict was unreasonable, or that it could not be supported by the evidence. In fact, the charge of conspiracy to defraud has to be proved by the evidence of false pretences. Having once got evidence of false pretences, the charge of conspiracy may or may not be proved. But for the evidence of false pretences there would have been no evidence of conspiracy to defraud.

As to the facts, it has been suggested that Cohen was not present on 19th February. There is strong evidence that he was present, both of Cook and of Thompson, who came in during the interview and subsequently took them the money. Max Cohen himself admits he was there part of the time, and the suggestion that he was not there because the money was used for another purpose than the one for which it was borrowed, viz., to pay out an execution on Cohen, only goes a very short way to the probability of the suggestion. Upon the question as to Cohen being a party to the charge of 4th March, the balance of evidence is that Cohen was not present; but there is evidence of a communication by Cohen and of the parties acting upon it. The story cannot be accounted for unless there was a communication, and unless Bateman had authority to make statements on his own and Cohen's behalf. Taylor's case is not so strong, but we cannot say there was no evidence upon which the jury could reasonably act.

With regard to Bateman's case, the evidence is so strong that it is quite impossible to say that the verdict is unreasonable. By sect. 4 of the Criminal Appeal Act, 1907, the Court of Criminal Appeal shall allow the appeal if they think that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law.

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The ruling of the learned judge that there was in fact a partnership between Bateman and Cohen was at most that in his view there was evidence of such partnership. If the learned judge told the jury that the fact of such partnership made each party criminally liable for the acts of the other, he no doubt committed a mistake in law, and a substantial one; and if the jury really understood this to be the fact there would have been a misdirection of law. The learned judge cannot have meant that. It may be that he may have been so understood, and if so the judgment must be set aside.

[The learned judge here read the evidence dealing with the draft partnership deed, and the learned judge's observation that "it did not matter what became of the money, because it went into the partnership account."]

Would the jury have understood that the fraud of the one would convict the other? Really, I cannot think the jury could have thought so. As to the other point, that the learned judge was wrong in stating that the appellants were partners, it may be that he was, if it was material; he ought not to have put it in that way; he should have said only that there was evidence that they were. There is no reason on this matter of the partnership for setting aside the judgment on the ground of a wrong decision of a question of law, since no question of law has really been misstated. No substantial injustice has been done. The real grounds of complaint assigned by each appellant are that the learned judge did not put their respective cases so far as they were in their favour; that he assumed facts which did not exist; that he did not put the facts fully and sufficiently; and that he interrupted the prisoners and their counsel. Do these grounds of complaint amount to a miscarriage of justice? We are all of opinion that the summing-up is not what it ought to have been. If the learned judge could have revised it, he would probably have corrected it. If it had led to a miscarriage of justice it would be different. But we all think that the facts were such that if the verdict had acquitted either of the prisoners it would not have been a reasonable verdict. The facts relating to the balance-sheets are extremely strong. It may be that they were made for purposes other than those for

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which they were actually used. Cohen's balance-sheet was, indeed, made for Young, a creditor. Cohen's affairs were investigated by an accountant, Skinner, but the information, upon which the balance-sheet was based, was supplied by Cohen himself, and although Skinner believed the balance-sheet to be all right, he was obviously misled on the facts. Cohen's original purpose was to prevent unpleasant proceedings by Young. The next use made of Cohen's balance-sheet was for the partnership between Bateman and Cohen. Cohen may have thought Bateman had the money he professed to have, and the same may have been true of Bateman's balance-sheet, the substance of which was stated before it was put into writing. This statement may have been devised for the purpose of deceiving Cohen. Each balance-sheet is inaccurate. The items in Cohen's are exaggerated. The items in Bateman's are also exaggerated, and the balance is inflated by supposed stock and securities. What has become of them and where did they come from? Bateman commenced business with £2,000 and ended with nothing. How could £2,000 have increased to that supposed balance by unsuccessful trading? Obviously the balance is wrong. Bateman had the opportunity of explaining the matter, and he was really not stopped on that point. Although a foreigner, his statement is quite intelligible. It was to the effect that his balance-sheet was made to justify a claim for a larger share of profits than he would have had on a true balance-sheet. The balance-sheets were clearly wrong, and were undoubtedly used fraudulently. Was the bill purporting to be accepted by Wilks a forgery? Wilks was called and said it was a forgery. David Cohen gave evidence as to the manner in which it came into existence. He is not so innocent as he professed to be. Probably his object was to relieve his uncle Cohen by putting the blame on Bateman. The learned judge did not tell the jury his evidence was necessarily true, but he did assume that the flogging took place. Thinking to prevent further notice being taken of the transaction, David Cohen perhaps invented the story of the thrashing, which is probably quite problematical. But here we have forged bills used by both prisoners for their own purposes. There may be some doubt whether Bateman was the forger, and Max Cohen may be rightly substituted for Bateman as the forger; but it does not signify who tempted the boy, if we are right in our view.

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Although there are possibly some matters in the summing-up which would constitute grounds for setting aside the judgment if they had led to a miscarriage of justice, yet we think a verdict acquitting these prisoners would be unreasonable. Notwithstanding that such a summing may nevertheless be within the statute, we are agreed there has been no substantial miscarriage of justice. The appeals, therefore, are dismissed.

Inskip and *Bulloch* applied that the sentences should run from the convictions and not from the judgment of the Court.

CHANNELL J.: We think that both sentences should run from the conviction. A large portion of the delay arises from the delay in this Court.

Appeals and applications dismissed.

Solicitor for the appellant Cohen: *Walter Pullan*, Leeds.

BEFORE

MR. JUSTICE CHANNELL, MR. JUSTICE JELF AND MR. JUSTICE COLERIDGE.

SAMUEL MILLER.

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Samuel Miller.

Persons proposed to be called as witnesses (on appeal) must be out of Court until they are called.

Appeal against conviction by leave of A. T. Lawrence J., and application to call further evidence.

D. W. Carr, for the appellant (under sect. 10 of the Criminal Appeal Act), who was present, said that the appellant was convicted of burglary on 5th October, 1908, before the Deputy-Recorder at Grimsby Quarter Sessions, and sentenced to eighteen months' imprisonment with hard labour.

The appellant now says he was in Birmingham at the time, and has witnesses in Court to prove an *alibi*. He had in fact been deported, and it was for this reason that he at first said he was not in England.

[CHANNELL J.: The prisoner's witnesses ought not to be in Court.]

The only evidence against appellant was that he pawned some of the stolen property on 5th October, 1908. Moreover, he was not identified until 24th March, 1909—five months after the alleged offence—by the pawnbroker's assistant and apprentice.

Tinsley Lindley, for the prosecution, was not called upon.

CHANNELL J.: The summing-up is unexceptionable and the case properly left to the jury. He now wants to call witnesses whom he could have called before. We do not think we can interfere. There is nothing to complain of in the trial or verdict.

Application refused.
Appeal dismissed.

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Daniel Smith and William Grainger.

DANIEL SMITH AND WILLIAM GRAINGER.

The Court will not interfere on the ground of misdirection when there is no substantial miscarriage of justice.

Appeals against conviction by leave of A. T. Lawrence J., and applications for leave to call further evidence.

Lister Drummond, for the appellants (under sect. 10 of the Criminal Appeal Act), who were present, said that both prisoners were indicted for stealing two boxes and two hundredweight of oranges, the property of Joseph Hayes, and Smith was also indicted for assaulting one constable and Grainger for assaulting another. The indictment for larceny only was tried; the assault cases were never before the Court. The appellants were both convicted before the Deputy Chairman at the County of London Sessions on April 29th, 1909, and sentenced to three years' penal servitude and two years' police supervision.

The appellants desired to call fresh evidence of an *alibi;* evidence of the assault was improperly admitted on the indictment for larceny, and when the appellant Grainger was cross-examining a witness he was stopped by the Chairman. The arrest did not take place till some days after the theft. In his summing-up the Chairman did not go through the evidence sufficiently fully. He omitted altogether the evidence of the *alibi* given by Elizabeth Grainger. He commented upon the statement made by Grainger to the police on the way to the station in a way likely to mislead the jury as to its meaning, and failed to draw their attention to points favourable to the prisoners, who were undefended.

[CHANNELL J.: The jury heard the evidence just before the summing-up. There must be such a misdirection as to lead to a substantial injustice, to move this Court.]

T. S. Sidney, for the Crown, was not called on.

CHANNELL J.: There is in this case no mistake in law. It is only in cases where we think there is a wrong verdict that we interfere. The trial cannot be objected to, and appellants cannot be tried again.

Applications refused.
Appeals dismissed.

JOHN SCOTT.

1909
28 *May.*
John Scott.

Presumption from the possession of property recently stolen.

Appeal against conviction and sentence, by leave of Jelf J., and application to call further evidence.

Oddie, for the appellant (under sect. 10 of the Criminal Appeal Act), who was present, said that the appellant was indicted with a French woman before the Chairman of the London Sessions on May 14th for stealing certain goods, and sentenced to eighteen months' hard labour. It appeared that the female prisoner and a woman of bad character were lodging with the prosecutrix, and requested the appellant to find them other rooms. This the appellant did, and fetched a cab, in which the two women removed, taking with them certain goods belonging to the prosecutrix. The appellant took no part in the removal of the goods, but met them when they were in the cab. Some of the goods were subsequently pawned by the female prisoner, and a pair of opera-glasses by the appellant, who stated they were given to him as a present by the female prisoner. When arrested the appellant was living in the same house with the two women, and produced a box, saying: "This is not my box, but the contents are mine." Other articles belonging to the prosecutrix were also found in the room, one a mackintosh which appellant was using, appellant telling the officer that he had no knowledge that they were stolen. Before the magistrate the female prisoner made a statement, in which she said the appellant knew that the goods had been stolen. The appellant denied this.

At the trial she went into the box, and on the learned Chairman saying to her: "You have made a statement. Is it true?" she swore that it was.

[CHANNELL J.: The prisoner had an opportunity of cross-examining her.]

Counsel submitted that the appellant admitted being in possession of the opera-glasses, but asserted that they were given to him by the women. He complained that the second woman was not called to contradict the female prisoner's statement. The appellant having given a reasonable explanation of his possession of the opera-glasses shifted the onus of proof on to the prosecution.

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[Jelf J.: It is grotesque to suggest that the prosecution ought to have called this woman.

Lord Coleridge J.: And, if the defence had, she would have been cross-examined.]

Counsel cited Archbold's Criminal Practice, 23rd ed. p. 340. The statement by the female prisoner was converted into evidence against the appellant by the answer she gave to the Chairman when he asked her if the statement she had made in the absence of the appellant was true. There must be corroboration of evidence given by an accomplice. The summing-up by the learned Chairman was unfair, in that he never pointed out that this evidence was that of an accomplice and needed corroboration. Counsel submitted that the Chairman should have cautioned the jury against the danger of convicting a prisoner on such evidence.

[Channell J.: He omitted some of the strongest points against your client.]

Yes. And omitted all the points in his favour. There is no corroboration of the female prisoner's statement that the appellant knew the goods were stolen. No comment was made by the learned Chairman on the appellant's denial

Purcell, for the Crown, was not called on (but in the course of the argument said, in answer to the Court, that at the trial he had not put in appellant's statement before the magistrate as, since the Criminal Evidence Act, 1898, the tendency of the practice was not to do so).

Channell J.: The jury are not supposed to be idiots. Any other verdict would be quite wrong. There is nothing wrong in the summing-up. It would be wrong to come to any other conclusion. The conviction must stand.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING, MR. JUSTICE PHILLIMORE, MR. JUSTICE BRAY, AND MR. JUSTICE A. T. LAWRENCE.

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Burden of proof—Where a primâ facie *case is made out and the defendant, by his defence, offers an explanation, the jury should be directed that the burden of proof that the offence charged has been committed is still on the prosecution, and if upon a review of the evidence on both sides they are in doubt, they ought to acquit. It is a misdirection to tell them that because the evidence for the prosecution established a* primâ facie *case, the burden of proof is shifted to the defendant.*

Joinder of counts alleging misdemeanours—If no application is made at the trial to put the prosecution to election, the Court will not entertain a complaint that the defence was embarrassed.

Venue—Obtaining by false pretences—Where the valuable thing obtained is posted in this country for delivery in a foreign country, an indictment is triable by the Court within whose jurisdiction is the place of posting: T. S. Jones (1 *Den. C. C.* 551; 1850) *followed.*

This was an appeal against conviction on leave granted by Walton J., and on grounds involving questions of law, and an application to call further evidence.

The case was argued on April 23rd and 24th, before Darling, Bray and A. T. Lawrence JJ., who desired that it should be heard by a fuller Court.

The appellant was indicted, with one Catling, before the Recorder at the Central Criminal Court on January 20th, 1909 (*a*), for conspiracy with each other, one Jones, and certain persons unknown to defraud by false pretences, and for obtaining money (through postal orders for various sums) from two persons, Funnell and Carter, by false pretences with intent to defraud each. (Details of the counts will be found in the judgment.) After a hearing lasting twenty-three days Stoddart was found guilty on February

(*a*) 150 Sessions Papers, C. C. C. 501.

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25th of obtaining money by false pretences (from Carter only) and of the conspiracy, and sentenced to eighteen months' imprisonment with hard labour, and was also ordered to pay the taxed costs of the prosecution under sect. 6 (1) of 8 Edw. 7, c. 15, the Costs in Criminal Cases Act, 1908. Catling was acquitted of the charges as to false pretences, but the jury were unable to agree in his case as to the conspiracy, and were discharged. Ultimately that charge was not further proceeded with.

Gill, K.C. (with him *Abinger*, *L. Green* and *A. D. A. M'Gregor*), for the appellant, who was present, on bail. The charge had reference to coupon competitions which, it was alleged, were either lotteries, or within the latter part of sect. 1 of 16 & 17 Vict. c. 119, the Gaming Act, 1853. The competitions were carried on in the following manner. Circulars were sent to persons who were known to have taken part in previous coupon competitions, containing a coupon. Upon the coupon was printed information with regard to forthcoming football matches, and an intending competitor selected the winners of these matches by marking his choice upon the coupon. Any number of guesses were permitted in each competition, a trifling fee being charged in respect of each. £300 was offered as the first prize, to be divided among the successful nominators of most correct returns (*i.e.*, in eleven or twelve matches at most), and a further sum of £100 was offered for the next best group of selections. When the coupons were filled in, they had to be sent to an office at Middelburg, Holland, and arrive there on the Saturday evening of the day on which the matches, to which the particular competition related, were played. On arrival the letters were opened and the postal orders checked, and then the coupons were stamped and put in bundles alphabetically arranged. Any person who thought he or she had been successful in the competition, had to send in a claim to reach Middelburg by the Wednesday morning following the Saturday upon which the matches were played. The rules of the competition provided that each competitor had to bear the risk of any mistake or non-delivery by the Post Office. Successful competitors were informed of the result of the competition in the next circular. These circulars were headed *Football Record*, *Racing Record* and *Football Sport*. *Football Sport* was the venture of one Price, which appellant financed for three numbers, when they disagreed about money matters—a few days before the prosecution began. (The

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summons was issued on September 24th, and the first hearing was October 1st.) In addition to the circular informing a competitor of his success, another circular was sent to him relating to betting transactions carried on by a firm of Drew & Co., at the same office at Middelburg. This was a business also belonging to the appellant, the idea being that a competitor having won money in a football competition, might desire to use that money for betting purposes. The office at Middelburg was managed by a man named Klinge, assisted by a number of clerks, who opened the coupons when they arrived at Middelburg, and Klinge sent the names of winners to the appellant, who lived in England. The circular containing the names of winners was based upon the returns from Middelburg. Klinge, with the assistance of others, from 1907 onwards arranged and carried out a fraud upon the appellant. The procedure was as follows:—A coupon, filled in after the results of the matches on a particular Saturday were known, was inserted among the coupons at Middelburg. Some fictitious name and address was appended thereto, and in due course the name was sent over to the appellant in England among the winners to whom prize money should be paid. In some cases money was sent in a registered letter to the address given, where by arrangement the money was collected at the instance of one of the parties to the fraud. The appellant had sworn that all this was done without his knowledge by persons acting against his interest. The appellant had carried on business as a betting agent and proprietor of similar competitions for over twenty years. For a long time he had been in conflict with the City authorities and the Anti-Gambling League as to whether these competitions were lotteries within sect. 1 of the Gaming Act, 1853. The funds resulting from the competitions connected with the circulars already mentioned were paid into a Dutch bank, but afterwards brought to England, whence payments to winners were made direct. In October, 1907, the appellant began to be dissatisfied with the way things were going at Middelburg—he had not himself been there since January, 1907—and in consequence he sent his son-in-law, Catling, over to Holland to investigate the matter. As a result of this arrangement, the appellant, by a letter dated November 27th, 1907, agreed with Catling, that on condition of his superintending the work at Middelburg, he should thenceforth have half profits in all future *Football Record* competitions. From that time

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onwards, Catling went over to Holland on Friday night, and returned by the Sunday night boat. At Middelburg one Windust also had an office, and carried on a business similar to that of the appellant. Windust was not only a business rival, but a person actuated by great hostility towards the appellant. It was in September, 1908, that Windust, having got hold of two men—one, Cowley, who had been dismissed in June, 1908, from the appellant's employ, and the other, Price, with whom the appellant had disagreed—induced them to prepare statements in the presence of a London detective, Inspector Collison, upon which the prosecution against the appellant was begun at the Mansion House, where the two men gave evidence.

The indictment contained eleven counts—four for conspiracy, and seven for obtaining money by false pretences. The trial lasted twenty-three days, and so complicated did the issue become that it was impossible for the appellant to have a fair and unprejudiced trial. The subject-matter of the charge should have been divided into two indictments, the method adopted having led to the utmost confusion. The first count alleged a conspiracy between the appellant, Catling, a man named Jones, and other persons unknown, and was worded as widely as possible. The second, third, and fourth counts were to the same effect, dealing with competitions connected with *Football Record*, *Racing Record* and *Football Sport* respectively. If the first count was good, the last three were quite unnecessary. There followed seven charges of false pretences, which were quite enough to answer at one time without the issue being fogged with questions of conspiracy. It was true that no objection was taken at the trial, but that fact should not prejudice the appellant if his case was never satisfactorily before the jury. (*Gibson*, 18 Q. B. D. 537; 56 L. J. M. C. 49; 56 L. T. 367; 35 W. R. 411; 16 Cox C. C. 181; 51 J. P. 742; C. C. R.; 1887; *Bertrand*, L. R. 1 P. C. 534; 36 L. J. P. C. 51; 4 Moore, P. C. N. S. 460; 16 L. T. 752; 16 W. R. 9; 10 Cox, C. C. 618; 1867.)

Two of the witnesses called by the prosecution to establish fraud were cross-examined on the appellant's behalf. One of them, a man named Funnell, was alleged by the defence to have been a competitor, competing under different names, and to have thus won £400 in one year—once £300 and once £150,

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and perhaps a good deal more—he admitted the £400. It eventually transpired that he must have been connected with the conspiracy against Stoddart, whereby fictitious winners were introduced. When the prosecution dropped counts 5, 8, 9, 10 and 11, Funnell's case was abandoned. There remained only Mrs. Carter.

It is necessary to deal separately with the counts. In one charge, known as the Butterworth case, it appeared that £300 was offered as a prize for the correct selection of the Derby winners in 1908. Three persons—Naylor, Heirli and Butterworth—and two others were returned by Klinge as sharers of the prize. Naylor turned out to be an *alias* for Funnell. Heirli was a genuine winner, as his evidence shews. Cowley gave evidence to the effect that he had been directed by appellant to call himself Butterworth, and to go to Gravesend to find a place to which letters might be sent. It was suggested by the prosecution that £100 was sent to Gravesend in the name of Butterworth, and reduced into the appellant's possession again by the interposition of Cowley. As a matter of fact, it was proved that the appellant, having received the three names from Klinge, drew a cheque for £300. This cheque was produced at the trial. Appellant gave this cheque to Catling to cash so as to pay £100 to each of the winners. Catling got three notes for £100, and posted three registered letters to Naylor, Heirli and Butterworth. The first two named received the £100, but within half an hour of the letter to Butterworth being registered, the note which ought to have been enclosed in it was cashed at the Bank of England. The registration of the letters was made at the Lombard Street Post Office on June 16th, 1908. On June 19th a sum of £90 in gold was paid into Catling's account. The note cashed had Butterworth's indorsement upon it. That indorsement was said to have been made by Jones, who was Catling's right-hand man and confidential assistant. He was also a director of Catling & Co., process engravers. There was no proper direction to the jury upon this case, no reference to changing the note into cash, and no reference as to the payment into Catling's account. If a man was to have a fair trial, it was necessary to direct the minds of the jury to each count. There was no proper direction with regard to Jones, who had disappeared. The case had been engineered by Windust, for he had been heard to say to Cowley—whom the appellant had

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dismissed—"Have you made up your mind to do as I want you to do? If so, I can shop the b——." Broadly speaking, the defence had never been put at all, which was contrary to the rulings of this Court. (*Mason*, 2 Cr. App. R. 59; 1909; *Warner*, 73 J. P. 53; 25 T. L. R. 142; 1 Cr. App. R. 227; 1908; *Carman Deana*, 25 T. L. R. 399; 2 Cr. App. R. 75; 1909; and see *Bray* v. *Ford*, (1896) A. C. 44; 65 L. J. Q. B. 213; 73 L. T. 609; H. L.)

In other cases, where prize money was entrusted to Catling, no trace of payment to winners had been found. Some of the notes, however, had been traced to Jones's possession. An accountant, Mr. Cash, was called by the prosecution to prove, that, after examining the appellant's banking account, he was unable to trace payments out of it which had been stated, in the various circulars issued, to have been won and paid to specified individuals. In dealing with one of the cases of alleged bogus winners, known as Browning's case, the Recorder said, referring to Mr. Cash's evidence: "The moment the prosecution had established the fact that not a farthing had been paid to one of the persons who are alleged to have received the sum of £60, the burden of proof was thrown upon Stoddart, he being charged with fraud in that connection, to show that in fact he had paid it."

Proceeding in the summing-up the Recorder further said: "Directly you have established that there is no trace anywhere of one of them having been paid, that no trace can be found of a farthing having been paid to him, the burden of proof is shifted on to Stoddart to shew that he had in fact paid it, and that is what he has set up; he was bound to do it; he could not help himself." These passages constituted a grave misdirection, for it was obvious that the appellant might have paid away money for these winners from funds other than those in his banking account, or by cheques other than those identified by Mr. Cash as being drawn for the payment of prize money. There was no doubt as to the Recorder's meaning, for he afterwards said that the case was analogous to the shifting of the onus of proof where a man was found in possession of recently stolen property. The burden of proof was not shifted by the evidence of Mr. Cash.

Throughout the whole of the proceedings an element of prejudice and hostility towards the appellant was noticeable. On the third day of the trial the learned Recorder impounded a document, an assignment of a debt to the appellant, and later, in the presence

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of the jury, it being suggested that the date of a letter put in evidence on behalf of the appellant had been altered, the appellant was told that his bail would be increased, and that two sureties in £5,000 (instead of £2,000) each would be required. The suggestion made was that the appellant was guilty of some fraud in connection with the letter. On the 13th day of the trial the learned Recorder said: "It is no answer to this case, so far as Stoddart is concerned, to say that he himself was the subject of fraud by his own servants unless he can shew that in every one of the cases brought against him he has been the victim of a conspiracy by his servants. You see what I mean. It is no answer to say that in half-a-dozen cases he was defrauded by his servants without his knowledge, if you find that there are cases in which the evidence shews he was a party to the conspiracy." In other words, the learned Recorder said that the burden of proof was upon the appellant, when in fact it was upon the Crown.

With regard to the false pretences charges, as embodied in the sixth and seventh counts—the only ones left after Funnell's case was abandoned—evidence was given by a Mr. and Mrs. Carter as to her being induced to enter the competitions owing to the circular stating that a certain J. Browning had won money in previous competitions. They were never asked the time-honoured question, whether they parted with their money relying upon that statement. They both won sums of money in the competitions, and duly received a remittance. The statement in the circular was admittedly untrue, but the prosecution had to prove that it was made fraudulently, as well as untruly. The explanation of the statement being made at all was to be found in the fact that the name of Browning was sent over from Middelburg to London as the name of a winner, and the appellant printed the name as a winner in the circular subsequently issued. Everything possible had been done to lull the appellant into a false belief that Browning was a genuine person, and the appellant in his evidence stated the fact that he handed Catling a cheque for £45 wherewith to pay him. An exchange slip was produced which shewed that Catling had cashed the cheque for eight £5 notes and £5 in gold. Catling admitted that the slip was in his handwriting, but said he gave the proceeds to the appellant. Browning's prize was £60, but the £15 was accounted for by a "deduction" slip, in Klinge's writing, as £15 was to be used to bet with Drew & Co. The case of

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Foster was similar. Mrs. Carter was supposed to have relied upon the representation that prize money had been paid to a man of that name at a given address, but in fact she sent in her second coupon before she had seen that Foster was a winner. In that case the cheque for £100 given to Catling by the appellant was produced. The appellant, as appeared from the exchange slip, had directed that this cheque should be changed for a £100 note, to be sent to Foster. The person who drew the money drew it out in gold, the slip having been altered. The handwriting of the alterations was not proved; the defence alleged it was Catling's. Catling denied this, and said he had never had the £100 at all, that the slip had been obtained from the bank after the prosecution was instituted and then altered, which involved a charge of forgery against the appellant. The bank manager proved that the slip as originally filled up was for a £100 note, and was altered before the bank stamped it. The only evidence suggested to shew that appellant knew that Browning and Foster were bogus winners was the dealing with his bank account—*i.e.*, whether cheques were drawn or not.

[Bray J.: The Lottery Acts might be a good reason why winners were not paid by cheques drawn in their favour.]

With regard to the conspiracy charges, these were charges alleging a conspiracy between the appellant, Catling, Jones and persons unknown. The jury disagreed upon Catling's case, and there was absolutely no evidence connecting the appellant with Jones; they were in fact almost strangers.

[The Lord Chief Justice: Would not the expression in the indictment "persons unknown" include Klinge?]

Klinge was known at the time the prosecution was started, and was called as a witness, and if the prosecution knew that he was an alleged conspirator, he ought to have been named in the indictment. An accused person is entitled to know with whom he is charged. (*Walker*, 3 Camp. 264 (1812); *Thompson* (1851), 16 Q. B. 832; Dears. C. C. 3; 20 L. J. M. C. 183; 51 Jur. 453; 5 Cox C. C. 166; Q B.) The prosecution never attempted to prove that there was a case of conspiracy with persons unknown.

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It is true that by 14 & 15 Vict. c. 100, s. 1, there is a power of amendment in immaterial matters, but it was not for the prisoner's counsel to suggest amendments in the indictment.

[The Lord Chief Justice: Assume that there was a proper direction, and that there was evidence that the appellant conspired with Klinge, must we interfere because Klinge's name is not in the indictment?]

Yes; the rules of criminal pleading stated that every ascertained person must be named. (*Robinson*, Holt's Nisi Prius, 595; 1817.) A defendant is entitled to have each count put separately to the jury, and in this case it was peculiarly necessary, to do justice, that the jury should have been directed on each.

As to dealing with the counts as separate indictments, counsel referred to the judgment of Hawkins J. in *Paul* (1890), 25 Q. B. D. at 202; 59 L. J. M. C. 138; 17 Cox C. C. 111; 62 L. T. 845; 38 W. R. 704; 54 J. P. 677; C. C. R. Appellant was entitled to have his real case presented to the jury, and it could not be assumed that no injustice had been done through what had happened—the law was now the same in criminal as in civil appeals. Counsel referred for an instance of "substantial wrong or miscarriage" caused by misdirection to the judgments of the noble and learned lords in *Bray* v. *Ford* (above, p. 222), where a verdict was set aside, and to *Dyson* (1908, 2 K. B. 454; 77 L. J. K. B. 813; 99 L. T. 201; 72 J. P. 303; 24 T. L. R. 653; 1 Cr. App. R. 13.) The counts in this case illustrated the extreme of laxity in pleading. There could have been no conspiracy with Price, if for no other reason than that there was no evidence connecting him improperly with the appellant: from first to last he never said a word against appellant. But Price did implicate Catling directly. During the trial mention had been made of twenty-two bogus winners representing thirteen competitions. [Counsel was discussing the evidence of various witnesses in detail when the Lord Chief Justice remarked that the Court could not consider minutely the evidence of every witness.] But the close intimacy and business relations of Catling and Jones would be sufficient to conceal from the appellant the real state of affairs. In this connection a witness for the prosecution named Singer gave evidence that Jones had asked him if he would let his name and

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address be used, inasmuch as he (Jones) could not use his own for fear the appellant would think he was "working something dirty." In conclusion the learned Recorder had directed the jury that a witness, Miss Gardiner, was entirely under the appellant's influence and devotedly attached to him. As a matter of fact she had left the appellant's employment before the prosecution started. Moreover, the jury were told that although the appellant had put a defence before them, the facts involved shewed that it was dishonest. Such direction was most improper. With regard to Catling's case, the direction amounted to a statement that if they found the appellant's story in conflict with Catling's, and if they were not convinced of the truth of the appellant's story, they must convict him. This was said, although there was no more reason for believing Catling's story than the appellant's. Then take D'Avyet's case——

[Bray J.: This was the first of the conspiracy cases, and if he was not guilty of that, there is a strong presumption in his favour as to the others.]

The cases of Barnes and of a number of others—called Barnes's case because that name was the first of six, all winners, and five certainly bogus winners—were not before the alderman, and the notice given was very short; there was thus great difficulty in obtaining evidence in rebuttal. As to the Singer and Morris cases it was clear that there was a plot to deceive appellant. The Recorder did not point out to the jury the bearing which the cases of Deacon, White and Williams, in which Stoddart's defence was overwhelmingly established, had upon the credibility of his defence on other cases. He should have directed them that these cases pointed strongly to Catling's guilt. Except Catling's evidence there was no direct testimony against appellant at all. There was no evidence of conspiracy between Stoddart and Jones, and the Recorder ought so to have directed the jury, and to have told them to disregard as against Stoddart all the evidence relating to Jones. They ought to have been so directed, specifically, in Robinson's case. (Wright on Conspiracy, p. 71.) He ought also to have told the jury to disregard the previous conviction for carrying on a lottery and the illegality of the business. (*Lee* (1908), 72 J. P. 253; 1 Cr. Ap. R. 5; 24 T. L. R. 627; (1909)

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2 Cr. Ap. R. 41; (1908) 1 Cr. Ap. R. 155; *Warner*, above, p. 222), whereas he emphasised these points in his summing-up, and mentioned that appellant had been in prison for some offence of the sort. A misdirection of fact is fatal to a conviction, just as much as one of law. (*Beauchamp* (1909), 25 T. L. R. 330; 2 Cr. Ap. R. 40; *Sovoski* (1908), 72 J. P. 435; 1 Cr. Ap. R. 98; *Coleman* (1908), 72 J. P. 425; 24 T. L. R. 798; 1 Cr. Ap. R. 50.) Because of the elements of prejudice involved in the case, the Recorder should have been more than usually careful to direct the jury as to the real evidence on each count. There was never any case put to the jury, in the opening or in the evidence, of conspiracy with persons unknown. There was an attempt by Catling's counsel to prove conspiracy—after the summons was issued—between Stoddart and Jones by introducing (although it could only be evidence against his own client) a conversation between Mrs. Catling and Jones in Catling's presence, but not appellant's, which was a confession by Jones implicating Stoddart. (See *Dibble* (1903), 72 J. P. 498; 1 Cr. Ap. R. 155.) A day or two afterwards Jones disappeared. This conversation should have been excluded, and in any case the Recorder should have warned the jury in his summing-up to disregard it, and should at the same time have pointed out that the evidence showed that Catling procured Jones's disappearance. There was no reference to his disappearance.

As to the false pretence counts (6 and 7) there was no real case, especially on the 7th count (Mrs. Carter's second case, *i.e.*, Foster's), and even if there was, the jury should have been told to regard the evidence admissible on those counts only.

Further, there was no jurisdiction to try the false pretence counts in England, because the offence, if any, was committed in Holland. The obtaining is the gist of the offence; that must be within the jurisdiction. (*Buttery*, cited 4 B. & Ald. 179; 5 D. & R. 619; 3 B. & C. 703; after 1757.) By 7 Geo. IV. c. 64, s. 12, an offence begun in one county and completed in another may be tried in either, but that does not affect foreign countries. (*Ellis*, (1899) 1 Q. B. 230; 68 L. J. Q. B. 103; 79 L. T. 532; 47 W. R. 188; 62 J. P. 838; 19 Cox C. C. 210; C. C. R.) Cases under that statute are not in point.

[PHILLIMORE J.: But *T. S. Jones* (1 Den. C. C. 551; 4 Cox

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C. C. 198; 4 New Sess. Cas. 353; 19 L. J. M. C. 162; 14 Jur. 533; 1850) was not decided upon the statute; the prisoner, it was there held, makes the postmaster his agent.]

It was, in fact, covered by and within the statute, and it was so argued. In this case the prisoner has precluded the agency of the Post Office by the terms of his offer to the competitor, who agrees that the proprietor is not to be responsible for any postal error or non-delivery. "An offerer, if he chooses, may always make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance." (Per Thesiger, L.J., in *Household Insurance Co.* v. *Grant* (1879), 4 Ex. D. at p. 223; 48 L. J. Ex. 577; 41 L. T. 298; 27 W. R. 858.)

[PHILLIMORE J.: This is not a case of contract, but of delivery.]

The prisoner has been ordered to pay the taxed costs of the prosecution—between £2,000 and £3,000. The case was committed to the December sessions, and should normally have been tried before the Costs in Criminal Cases Act came into force, on Jan. 1st, 1909. The main charge of conspiracy between Stoddart and Catling failed, as did also the five counts for false pretences relating to Funnell.

Muir (with him *Leycester*), for the City Police, was required to direct his attention mainly to the alleged misdirection as to onus of proof, and to the effect on Stoddart's defence of the sub-conspiracy against him.

In order to appreciate the point as to onus of proof, the Court must have before it the case which was presented for the prosecution. With regard to the counts for false pretences, the evidence adduced would have been the same if they had gone to the jury alone. They alleged overt acts in pursuance of a conspiracy. The following cases of bogus winners implicated Stoddart directly:—D'Avyet, Foster, Morris, Barnes, Rolandson and Rowley. The following contained evidence of conspiracy with persons unknown:—D'Avyet, Browning, Willis and Deacon. The Butterworth case implicated Stoddart, Catling and Jones; the Price case implicated Catling directly. The real object of appellant's combination with Price was to get him out of the way as a rival, but the importance of

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this case was that it afforded also evidence of the settled course of business of introducing bogus winners. As to the sub-conspiracy, the evidence was open to either view, that the cases spoken to by the witnesses Robinson and Singer—viz., that they took bogus addresses at the request of Jones and got prize-money there—might or might not have been known to Stoddart. In any case it was not a conspiracy to defraud Stoddart, even if he did not know of it; he only paid what he must in any case have paid. The persons really defrauded were the genuine winners who thus got less than their proper share.

With regard to D'Avyet, Stoddart undoubtedly retained the £300. He admitted this. His registered letter to D'Avyet (in which he declined to send prize-money to any but the coupon address) was a dummy and a sham, and his explanation that he was holding the money in case D'Avyet turned up was not consistent with the fact that in a later issue D'Avyet is alleged to have been paid. In Browning's case, admittedly, no one received £60. A person unknown arranged for letters to be sent to 259, Broadway, W. Hendon, but never called again. No original written list of winners containing Browning's name, sent by Klinge to London, was produced.

[Bray J.: But there must have been one sent, or how did they get the names of that week's genuine winners?]

It was not produced, because if it had been, Browning's name would not have been there.

The accountant, Mr. Cash, shewed that no money was drawn out of Stoddart's bank for Browning. No registered letter was either delivered or called for at the address given. That was enough to shift the onus on to Stoddart. Moreover he accepted that position and took upon himself to satisfy the jury that he had provided the money. The only practical question for the jury was, "Do you believe Stoddart?" Exactly the same kind of evidence was given in Willis's case. In Foster's case no letters, it was proved—no registered letters were sent, and, if they had been, would not have been received at the address given, and would come back through the post, as no such name was known there. Therefore Stoddart was the only party who could benefit by the fraud.

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[PHILLIMORE J.: Unless Stoddart gave Catling the money, and Catling did not post it.]

That could only be if Catling knew beforehand that Stoddart would give him the money to pay Foster. The £100 cheque alleged to have been for Foster was, according to the prosecution, in fact drawn for the purpose of paying the consolation prizes of £100 in the next competition, which was the one in which McNulty (with regard to whom the charge was abandoned) was the winner of the premier prize of £300; Catling did not say this, but said that it was for some competition other than Foster's.

The case of Roe, which was in effect that of Rolandson and Rowley, was a strong case. Roe swore that Stoddart paid him £5 for the use of his (real) address, which he said he wanted to frustrate people whom he suspected of swindling him: at that address the name of Rolandson was to be used. The same address with the name of Rowley appears in the Barnes case. Stoddart was the only person proved to have known his address, or able to make use of him. Rolandson and Rowley were printed as winners.

Barnes's case was very significant: both Stoddart and Catling are agreed that all six winners were bogus. As to three of them, it might be that Stoddart thought three were genuine, for he drew a cheque for £243: 18*s.* 0*d.*, the exact sum due to three winners of £81: 6*s.* 0*d.* each. As to the other three, of whom Rowley was one, no persons of the given names were known at the respective addresses; no money was drawn out of the bank for them; and no registered letters were sent. Appellant's explanation of this case was absurd.

Morris's case was that a registered letter was sent to a bogus winner at an address that did not exist, produced in Court, opened, and found to contain Stoddart's advertisements.

The case of Singer was involved in the same competition as Morris's. Bank-notes were traced to Jones which had been sent to Singer, and to Stoddart which should have been sent to Morris.

So far from being unfair to Stoddart, the Recorder did not always accept the suggestions of the prosecution, but several times put in his favour points which the prosecution had pressed against him.

In the cases where Robinson was the witness the Recorder did

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not give the direction complained of as to the onus of proof, because, in fact, the money was traced out of Stoddart's account. On the contrary, he directed the jury to acquit Stoddart of any conspiracy in respect of those cases.

Stoddart and Windust had for some time been accusing each other of publishing bogus winners, and asking in their publications what the Director of Public Prosecutions was doing.

[Darling J.: Has the Director investigated Windust's business?]

No.

With regard to the corroboration of Cowley, it is true that there were certain discrepancies of date between him and the witness May Andrews, but it was for the jury to choose between them.

[Bray J.: If the jury believed Price they must have convicted Catling.

The Lord Chief Justice: I do not understand, in view of a great deal of the evidence, how they could have acquitted Catling while convicting Stoddart.

Darling J.: They did not acquit Catling altogether; they disagreed on some counts.]

Great light is thrown upon the case by what occurred after the summonses were issued. Stoddart attempted to get Catling out of the country. He brought Klinge over to England on Sept. 29th, and between then and Oct. 8th, as the prosecution suggested below, Klinge manufactured a number of documents which were afterwards produced by Stoddart. All the passages with regard to onus of proof should be read together. In all the instances in which the Recorder imposed upon him the burden of proof Stoddart accepted the position.

[Darling J.: But the direction complained of is that given after the defence.

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BRAY J.: That is to say, because Stoddart has given evidence, there is an onus upon him which there would not otherwise have been.]

The moment the prosecution have shewn that on the face of it winners have not been paid, the onus is upon the person who has the materials and facts in his possession.

[BRAY J.: In Willis's case it is Stoddart's oath against Catling's. Can it there be right to say that the burden is upon Stoddart? Why more than upon Catling?]

In that case there was some evidence to corroborate Catling, and he was not the person who drew the prize-money out of the bank, and Stoddart was. If there is a *primâ facie* case made out, and the jury are not satisfied with Stoddart's explanation, they ought to convict him.

The Recorder told the jury that the sub-conspiracy was no defence, unless they were satisfied that Stoddart did not himself conspire.

[BRAY J.: That is to say, if you are in doubt you are to convict.]

Not very happily put, but later on he puts it, "if you are satisfied that there are cases in which he was concerned."

Even if I am wrong on this point, there has been no "miscarriage of justice," and the case comes within the proviso to sect. 4 of the Criminal Appeal Act.

Gill, in reply. There was a miscarriage of justice; Stoddart did not have a fair trial. The facts have been stated in this Court with great detail, and in a most hostile spirit. For instance, with regard to Foster the case put forward here is quite different from that made in evidence at the trial. The McNulty charge which was abandoned had no relation to the consolation prizes, but to the first prize of £300; and Catling's story about the £100 cheque was always that he never had it.

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The whole of the work connected with the competitions was carried on abroad. The coupons were sent to Holland, the list of winners compiled there, and all the arrangements were there carried out by Klinge under the supervision of Catling, but all the time appellant was in England. Windust had never accused the appellant, as had been stated here, of publishing fictitious winners. The appellant had published extracts from papers with regard to a case in which Windust was concerned.

[Darling J.: If Windust was attacking the appellant at that time, the appellant would be very unlikely to do that of which he was accused.]

The errors into which the learned Recorder was led were due to the way in which the case was presented. The multiplicity of charges was likely to cause a miscarriage of justice. Upon the question of misdirection as to onus of proof, further reference was made to *O'Doherty* (1848), 6 State Trials, 875; *Abrath* v. *The North Eastern Railway Co.* (1883), 11 Q. B. D. 440, at 452; *per* Brett M.R. (1886), 11 Ap. Cas. 247; 55 L. J. Q. B. 547; 55 L. T. 63; 2 T. L. R. 416; 50 J. P. 659; H. L. Counsel also read a passage from Wigmore on Evidence, vol. iv., sect. 2513 note, p. 3562. That referred to the judgment of Mr. Justice Weaver, in *The State* v. *Brady* (1902), Ia., 91 N. W. 801:—

"The use of the terms 'presumption of guilt' and '*primâ facie* evidence of guilt' with reference to the possession of stolen goods has perhaps been too long indulged in by Courts and text-writers to be condemned; but we cannot resist the conclusion that, when so employed, these expressions are unfortunate, and often misleading. . . . 'Presumptions' of guilt and '*primâ facie*' cases of guilt in the trial of a party charged with crime, mean no more than that from the proof of certain facts the jury will be warranted in convicting the accused of the offense with which he is charged."

The effect of the whole of the summing-up was that if the appellant could not explain every single case, he could not succeed in his defence.

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The Lord Chief Justice read the following written and considered judgment of the Court:—

In this case an indictment was preferred against the appellant

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Joseph Stoddart and a person named Frederick Catling. The indictment originally contained eleven counts, the first four charging the two defendants with conspiracy with one Jones and other persons unknown to defraud the public, and the last seven with obtaining money from persons named by false pretences. Upon the direction of the Recorder the defendants were acquitted on the fifth, eighth, ninth, tenth and eleventh counts. The appellant Joseph Stoddart was found guilty on all the remaining counts. Frederick Catling was acquitted on the sixth and seventh counts, charging him with obtaining money by false pretences, and the jury being unable to agree were discharged from giving a verdict on the counts alleging conspiracy. The case lasted twenty-three days. The appellant Joseph Stoddart by his notice of appeal alleged thirty-six matters in respect of which it was contended that the learned Recorder had misdirected the jury, and he further raised certain points as to the alleged improper admission and rejection of evidence. With many of these points it will not be necessary to deal in detail, as they were not mentioned in the course of the argument; others allege in different forms the same misdirection.

In order to understand the way in which the various questions arise it is necessary to state in general outline the case as presented by the prosecution. The defendant Joseph Stoddart had an office in London and an office in Middelburg, in Holland. Stoddart was the proprietor of and issued during the year 1907 and part of 1908 a publication entitled *Football Record*. This publication announced that £400 was every week divided amongst competitors, £300 by way of a first prize to be divided amongst the competitors who predicted twelve correct results and £100 divided among those competitors who predicted eleven correct results. There were certain other rules as to distribution of money in the event of no competitors being entitled to the first prize, the announcement being that £400 was divided every week amongst competitors. Up to the beginning of October, 1907, the business in London had been managed by Joseph Stoddart and his clerk, a Miss Gardiner, and the business in Middelburg had been conducted by a man of the name of Klinge, assisted by other persons. By the rules of the competition the competing coupons had to be posted in time to reach Middelburg on the evening of Saturday in each week, the claims had to be posted on the Monday following, so as to reach

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Middelburg on the Wednesday morning, and the names of the winners were published in subsequent numbers of *Football Record*, and the amounts afterwards remitted to the persons alleged to be the winners. There was no evidence that the defendant Frederick Catling, who was a son-in-law of Stoddart, had any connection with the business until the first week in October, 1907; but from that date he used to visit Middelburg every week to superintend the business there, and also gave assistance to the business in London. Between October 12th, 1907, and September 24th, 1908, according to the evidence, the names of thirteen bogus winners were published—that is to say, the names of thirteen persons were published as winners who either did not in fact exist or to whom no prizes had been sent. The amount paid in prizes during this period was upwards of £22,000, and the amount which ought to have been paid to the bogus winners had they been genuine was the sum of £1,500. The evidence for the prosecution established, and it was not disputed by the defendant, that the thirteen supposed winners in question were bogus winners, and that their names and supposed addresses ought never to have appeared in the numbers of *Football Record* as genuine winners.

The way in which these frauds were carried out was that certain persons filled up a coupon at Middelburg after the result, with a false name and address, and returned the bogus name to Stoddart in London as being among the winners. Letters were then addressed to the bogus winners at the same time as letters to the genuine, and the prize money afterwards put into envelopes addressed to them. The letters to bogus winners were either intercepted before they were sent off, or arrangements made to get possession of them at the address given. The examination of the coupons and of the claims subsequently sent in took place at Middelburg, and the names of persons who appeared to be entitled to any share in the prizes were returned to London. If any doubt arose upon the coupon itself, it was sent to London for investigation, and any inquiries would be made from the London office. All the money required to be distributed among the winners was provided by Stoddart, and the envelopes in which registered letters were sent out were prepared sometimes by Stoddart and his clerk, Miss Gardiner, but it was stated after October, 1907, mainly by Catling and Jones, assisted by

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Miss Gardiner, and that Miss Gardiner addressed the registered envelopes. The defendant Stoddart denied that he had any knowledge that any of the thirteen bogus winners were, in fact, bogus, and further gave evidence that he had provided the money for distribution among them all, and had parted with the whole amount except one sum of £300, alleged to have been won by a man named d'Avyet, which he said he still held for him. Stoddart's case was that the frauds and false publications of winners' names were done entirely without his knowledge, and the money retained by the defendant Catling and other persons in league with him, who were conspiring to obtain from him (Stoddart) the money supposed to be due. The money was remitted to the various winners in bank-notes or cash, and the cheques by which money was drawn from week to week did not specify the name of any particular winner, but were drawn to "self," and then cashed so as to obtain the necessary notes and other money for division. This brief outline of the facts will be sufficient to follow the points in respect of which it is alleged that the Recorder misdirected the jury.

Before, however, dealing with the suggestions made as to misdirection, Mr. Gill, on behalf of the appellant, raised several contentions with which the Court must deal.

It was contended that the Court had no jurisdiction to try and convict on the counts for obtaining money by false pretences, inasmuch as the postal orders and letters containing money were received by the defendant's agent at Middelburg, and that by the rules of the competition Stoddart was only responsible for money received there. In the opinion of the Court there is not the slightest ground for this objection to the jurisdiction. The false pretence, if made, was to induce the persons to part with money and send it to Middelburg, either by postal order or in stamps or cash, and when the postal orders and letters containing money were posted in London or within the jurisdiction of the Central Criminal Court for transmission to Middelburg, there to be received by the defendant, the offence was complete. In *R.* v. *T. S. Jones* (above, p. 227) a similar contention was raised and decided against the defendant, and that case has been followed in many others. (See Archbold's Criminal Pleading, 23rd ed., 609.) It was further contended, on the authority of *R.* v. *Thompson* (above, p. 224), that, as the jury did not find Catling guilty on the conspiracy

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counts, the Recorder ought to have directed the jury to acquit Stoddart, and that there was no evidence of any conspiracy with persons unknown, and that as soon as Klinge's name was known as one of the persons taking part in the conspiracy to publish the names of bogus winners his name ought to have been inserted in the indictment, and that therefore the proceedings were bad. We are wholly unable to follow this objection. The first four counts alleged that the defendants Stoddart and Catling conspired together and with Jones and divers other persons whose names are unknown. Had there been no persons involved in the conspiracy other than Stoddart and Catling, if the jury had acquitted Catling, Stoddart could not have been convicted. There was evidence for the jury that Stoddart was connected with Jones, Klinge, and possibly other persons. No objection of any kind was raised at the trial, and in our opinion the defendant Stoddart is not entitled to rely upon any such point in order to invalidate his conviction.

It may well be that in a particular case it is undesirable that an investigation of more than one misdemeanour should proceed at the same time, and the experience in this case is sufficient to shew how much wiser it is to try defendants for the real offence they have committed instead of for a lesser offence. No doubt it may be said that in each case where a person was induced to compete upon the faith of the advertisements, which were in fact untrue, there was an obtaining of money by false pretences, but the real offence here was not the obtaining of an individual subscription so much as the conspiring to establish a scheme whereby the public were induced to subscribe money and to compete upon the faith that the prizes were given to genuine winners, whereas in fact either the amounts stated were not in fact distributed or were being participated in by persons who had fraudulently sent in correct coupons. There is, however, one conclusive answer to the contention as to the joinder of counts—namely, that if the defendants were in any way embarrassed by the joinder of the counts for false pretences and conspiracy the learned judge might have been asked to call upon the prosecution to elect. Where a trial such as this has been conducted without any application being made by the learned counsel who appeared for the defendants upon a matter upon which the judge would no doubt have exercised his discretion, it certainly cannot be raised by way of objection, as it

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is attempted on the present appeal. There is no doubt, as was pointed out in *R.* v. *Paul* (above, p. 225), there are many cases in which, if a defendant is being tried upon an indictment charging more than one misdemeanour, it may be necessary to point out to the jury that certain evidence can only be considered in connection with some counts and should be disregarded as to others. In this case we agree with the argument urged by Mr. Muir that the evidence of conspiracy would be to a great extent the same as that which would be given in order to shew that the pretences made were false, and was relevant to the counts as to false pretences in order to negative mistake and to shew the intent with which the names of bogus winners were inserted. In our judgment the Recorder sufficiently distinguished between the counts, and no valid objection can be taken to his summing-up on this head.

It was further urged on behalf of the appellant that the conviction could not stand because the defendant Stoddart had never had a fair trial, and in support of this view it was said that the Recorder misdirected the jury in not directing them specially that Stoddart was innocent of having altered the date of a certain letter, and that the increase of bail of £10,000 ordered at a certain stage of the trial was improper, and further in not directing the jury that he, the Recorder, was wrong in having ordered increase of bail and a certain document connected with the witness Price to be impounded. These two arguments referred to an incident which occurred during the trial in which, a suggestion having been made that the date of the letter might have been altered, the Recorder did increase the bail and did order certain documents to be impounded. This incident occurred on the third day of the trial, and the counsel for the prosecution on the next day expressly stated that there was no ground for the allegation and the Recorder reduced the amount of bail. The incident was not further referred to, and to suggest that in a summing-up which occurred after twenty-two days' hearing it was misdirection not to have again referred to this incident and to have stated that he, the Recorder, was wrong in acting as he did, is in our judgment groundless, and, as we have before observed, the conduct of no case lasting such a length of time can be free from criticism, especially by those who examine the case without having been present at the trial.

It was further contended that the learned Recorder misdirected the jury in the passage at page 16 of the summing-up as to the

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witness Gardiner. The direction suggested in the defendant's notice of appeal is not to be found in the summing-up of the Recorder. He quoted an answer which was given by Catling, and felt it his duty to caution the jury as to the evidence of the witness Gardiner. It is, in our opinion, quite impossible to contend that what he said amounted to misdirection, or to adopt the suggestion that in consequence of this statement the verdict must be set aside. Some caution as to the position of Miss Gardiner with reference to the defendant Stoddart and the weight of her evidence was clearly necessary, and it is no part of the duty of this Court to criticize the particular form of words used if, as in this case, it cannot be properly suggested that they involve misdirection in law upon some material part of the case.

It was further contended that the conviction must be set aside on the ground of misreception of evidence, in that evidence was given of a conversation between Mrs. Catling and Jones which took place when Stoddart was not present. In our judgment no valid objection can be taken to the reception of the evidence. It must be remembered that Catling was also on his trial, and it was material for him to establish that he did not know before a certain date that Jones had written out a claim and cashed a note, and he (Catling) was entitled in his own defence to have that statement corroborated by the evidence tendered. The Recorder could not have rejected the evidence, Catling being upon his trial and entitled to corroborate his own evidence. Moreover the Recorder distinctly told the jury that the conversation was not evidence against Stoddart, and the matter was not further referred to in the summing-up. It was further contended that the conviction could not be supported because a witness, De Friese, had not been ordered to give a certain explanation of a passage in a letter, but when the matter came to be examined there was found to be no ground for this suggestion, and it was withdrawn by Mr. Gill.

The next point as to which it is suggested on behalf of the appellant that there was a misdirection is as to the evidence given on Stoddart's behalf that the names of the bogus winners were inserted by Catling and in furtherance of a conspiracy unknown to him (Stoddart) to obtain money from him. The passages mainly relied on are, first, that at page 13 of the summing-up:—"When we come to examine these cases in detail together, I must say I do not think the evidence supports him. What I do think

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is that there is very strong evidence for your consideration in this case that there was a conspiracy within a conspiracy; that is to say, that Stoddart was the man who was the lion, if I may say so, and that the others, wherever they come in, had a little conspiracy on their own account, and when we come to examine the cases I think you will find there is considerable ground for coming to that conclusion. That is why I very early in the case cautioned you by saying that it is no answer for Stoddart to say, 'I can shew that these men have been conspiring together to defraud me.' That is not an answer to the case, unless you are satisfied that he did not himself conspire to defraud, or did not obtain money by false pretences himself." In our judgment, then, there was in this respect no substantial misdirection; on the contrary, we think it was correct to tell the jury that the existence of a subordinate conspiracy to defraud Stoddart would not be any answer to the case made by the prosecution unless they were satisfied that Stoddart did not himself conspire to defraud or did not obtain money by false pretences.

It was further urged that the Recorder misdirected the jury in saying that Stoddart was carrying on an illegal business and that it was scandalous. This probably refers to the passage at page 25 of the summing-up. While we quite agree that it was very important that in such a case the jury should be told that the indictment in respect of which the defendant was being tried was not in any way based on the illegality of the scheme of competition, we observe the fact that the business was being largely carried on at Middelburg because it would have been illegal to have carried it on in England was more than once referred to by the counsel on both sides, and in our judgment it cannot be successfully contended that the jury did not consider the real questions raised or that we ought to interfere because of the passages above referred to, or of any suggestion of prejudice.

The counsel for the appellant went even further and contended that the fact that the learned Recorder had ordered the defendant Stoddart to pay the costs of the prosecution supported the contention that he, the defendant, had not had a fair trial. In our opinion, the case was eminently one in which it was right to order the defendant, if convicted, to pay the costs. With reference to the contention urged by the appellants that he (Stoddart) did not have a fair trial and that the learned Recorder was himself

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influenced by prejudice, as was contended on behalf of the appellants, and allowed the jury to be influenced by such prejudice, we think that a fair consideration of the summing-up as a whole shews conclusively that there is no ground whatever for such a suggestion. The learned Recorder pointed out to the jury that they were in fact trying sixteen or seventeen cases. He examined each one of them in detail. As to ten or twelve separate charges he expressed his opinion in favour of the defendant Stoddart; as to another he pointed out that the case was too doubtful; and as to five others he expressed an opinion adverse to the defendant Stoddart. In our opinion the careful examination of these cases by the Recorder and the expressions of opinion in favour of Stoddart in the cases in which he considered the evidence insufficient or doubtful rebut entirely the suggestion that he allowed himself to be influenced by prejudice in the conclusion at which he arrived in each case.

There remains to be considered a very important point raised by Mr. Abinger at the conclusion of the trial, and in respect of which he applied for leave to appeal, and that is as to the direction of the learned Recorder that the *onus* of proof had been shifted from the prosecution to the defendant. This raises a very important question, and, in our opinion, the only question of difficulty in the whole case—namely, as to the proper direction as to *onus* of proof where *primâ facie* evidence has been given on the part of the prosecution which, if unanswered, would raise a presumption upon which the jury might be justified in finding a verdict of guilty, and the defendant has called evidence to rebut that presumption. Presumptions of fact which afford evidence of guilt vary in degree. As pointed out at p. 340 of the twenty-third edition of Archbold, facts and circumstances may raise a presumption so strong that guilt necessarily follows, or they may raise a presumption upon which the jury might be directed that if satisfied by the evidence that the facts alleged by the prosecution are established and no explanation is offered, they, in some cases, ought to find a verdict of guilty, or they may be of so little weight that the jury ought to be told that they raise no presumption which calls for an answer from the defendant. In our opinion when it was once established that, in repeated issues of the paper of which the defendant Stoddart was the proprietor, a series of announcements had been published for a number of weeks stating that certain persons,

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whose names and addresses were given, had gained prizes, and that in the event of no scrutiny being demanded the amounts would be sent to them on named dates, and when it was proved that subsequently, as in the month of May, 1908, an announcement was made recording the results of thirty competitions and stating that thirteen competitors had received prizes as to whom it was, in fact, proved that they were bogus competitors and that no money had been received in respect of these prizes by any *bonâ fide* competitors—when this was established and proved, evidence had been given which called for some explanation, and had the case rested there, the Recorder would have been justified in telling the jury that in the absence of any explanation they would be justified in finding that Joseph Stoddart was a party to a conspiracy to put forward false representations in order to defraud the public. The question, however, in this case is as to the direction which ought to be given where, as in this case, the defendant gave and called evidence in answer to that *primâ facie* case. It seems to us that the jury should have been told that if they accepted the explanation given by and on behalf of Stoddart, or if that explanation raised in their minds a reasonable doubt as to his guilt, they should acquit him, as the onus of proof that he was guilty still lay upon the prosecution. If upon the whole evidence the jury are left in a real state of doubt the prosecution has failed to satisfy the onus of proof which lies upon them.

It is now necessary to examine the passages in the Recorder's summing-up upon which the point, raised by Mr. Abinger and argued before us by Mr. Gill, was based. The first of these passages occurs on page 12 of the shorthand notes of the summing-up, and refers to the case of a bogus winner of the name of Browning whose name appeared as a winner of £60 in the *Football Record* No. 22, published on November 2nd, 1907. It is in the following terms:—"The moment the prosecution had established the fact that not a farthing had been paid to one of the persons who are alleged to have received the sum of £60, the burden of proof was thrown upon Stoddart, he being charged with fraud in that connection, to shew that in fact he had paid it. You follow me; the burden of proof is upon him. Under ordinary circumstances the burden of proof is in the first instance upon the Crown. They allege a man has been guilty of fraud and they have to prove it; but when, as in this case, you find that Stoddart is sending out

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to the world that people have won £60, and have received that £60, and when upon investigation it is found that the money has not been paid, then the burden of proof is upon him." The next passage occurs on page 20, in which the Recorder used the following language:—"It has been admitted that the burden of proof is upon Stoddart that he paid this money and he has endeavoured to shew it in that way. If you do not believe his evidence then he ought to be convicted, and I think upon that seventh count, as upon the sixth count of the indictment, you ought to acquit Catling. I come next to the case of Willis, which, I am thankful to say, I think I can dismiss with a very few words. It is a question really in Willis's case of oath against oath. Willis, of course, is a bogus winner. Mr. Cash, when he comes to investigate the case, finds no trace of £60 having been paid at all. The burden of proof is again upon Stoddart—a very unlucky man that Stoddart—to shew that the money had been paid." Again, on page 31, dealing with the case of Deacon, the Recorder said:—"As I have said before, so it is here in this case, that the presumption is against Stoddart. Directly you find people have not been paid it puts him upon giving an explanation as to why they were not paid, and it imposes upon you the obligation of asking yourselves the question—Had Stoddart given a reasonable explanation or has he not? If you think he has given a reasonable explanation, you ought to act upon that, or if there are two explanations, an explanation by Stoddart and an explanation by Catling, each of them saying that it is the other who is guilty, then if this case stood alone you would be in this position, you would have to say—'Whom am I to believe?'"

If these directions had been addressed to what may be called a minor incident in the case, as, for instance, some particular question of fact set up by the defendant as an incident in or a part only of his defence, it would be necessary to consider the question of the alleged misdirection from a different point of view. But in dealing with them it must be borne in mind that the one substantial issue raised by the defendant Stoddart from the beginning to the end of the trial was that the insertion of the bogus names and addresses as winners was the act of Catling, Klinge and other persons who were conspiring to unlawfully obtain a part of the prize money which he (Stoddart) was supplying, and it seems to the Court that the jury ought to have been told that the prosecution having given

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primâ facie evidence from which the guilt of the defendant might be presumed, and which, therefore, called for explanation by the defendant, the jury ought to consider the evidence upon both sides, and if upon a review of the whole of the evidence they were satisfied that the prosecution had made out the case that the defendant Stoddart was a party to the conspiracy they should convict him, but that if their minds were left in a state of doubt they ought to acquit him, as the burden of proving the defendant's guilt was still upon the prosecution. The passages which have been cited at length are the only passages in the summing-up which bear directly upon the question of the onus of proof. The concluding words of caution at the end of the summing-up cannot be said to qualify the specific direction to which attention has been called. In the opinion of the Court the jury may have thought that if Stoddart had not proved that he had supplied moneys in every case they must convict him, whereas the direction ought to have been that they must be satisfied, after consideration of all the evidence, that the Crown had proved that Stoddart was a party to the conspiracy, and, if in doubt, they ought to acquit him. It is in failing to adequately explain this that the Court is of opinion that there was a substantial misdirection. Moreover, the direction in this case was the more important, because, inasmuch as the learned Recorder told the jury that in a great majority of the cases he considered that the existence of a conspiracy to defraud Stoddart was made out, it was, therefore, for them to consider whether a conspiracy might not extend to all the cases as to which the prosecution had given evidence. Had there been any other passages qualifying this direction or directing the jury in accordance with the law as we have stated it, the conclusion might be different; but the passages cited are the only specific directions given by the learned Recorder to the jury, and the general caution at the conclusion of the summing-up as to entertaining a reasonable doubt does not appear to the Court to modify the effect of these directions as to onus of proof.

Notwithstanding the view which we have expressed, we have had seriously to consider whether we ought not to dismiss the appeal under the proviso of sub-sect. 1 of sect. 4 of the Criminal Appeal Act, 1907, on the ground that no substantial miscarriage of justice has actually occurred. This, in our opinion, raises a question of great difficulty. The explanation given by Stoddart

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as to many of the cases was most unsatisfactory. There was, in the opinion of the Court, strong evidence against him to support the view taken by the jury; but we cannot say that the facts established are inconsistent with his innocence. Attention was called upon this point to the judgment of this Court in *R.* v. *Dyson* (1908, 72 J. P. 272, and 1 Criminal Appeal Reports, at p. 15), in which in delivering the judgment of the Court dealing with this proviso I said that we could not in that case say that if they had been properly directed the jury must have come to the conclusion which would have supported the conviction. We think it is open to consideration whether the word "must" is not too strong, and whether the proper question is not, whether if properly directed the jury would have returned the same verdict. We are unable to come to the conclusion that in this case if the jury had been properly directed they would have thought that the facts proved were inconsistent with the defendant's innocence, and might not have had a doubt whether the prosecution had failed to satisfy them that the defence set up by Stoddart, that the bogus winners were inserted without his knowledge by persons conspiring against him, was not made out. The fact that the jury were not agreed as to Catling's guilt and returned no verdict against him on the conspiracy counts affords some ground for this contention, that, under a proper direction, the jury might have had a reasonable doubt as to Stoddart's guilt.

This appeal has brought out in strong relief the absolute necessity in the interests of justice of this Court having the power in exceptional cases to order a new trial. Such a power would be rarely exercised; but if there be in any case strong evidence upon which the jury, if properly directed, might have found a verdict of guilty, in the interests of justice the Court should have the power to direct a new trial.

We cannot part from this case without making some observations which may, we trust, be of service with reference to the practice of this Court. As appears from the judgment which has just been delivered, the case for the appellant was conducted by making a minute and critical examination, not only of every part of the summing-up, but of the whole conduct of the trial. Objections were raised which, if sound, ought to have been taken at the trial. Probably no summing-up, and certainly none that attempts to deal with the incidents as to which the evidence has extended over a

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period of twenty days, would fail to be open to some objection. To quote Lord Esher's words in *Abrath* v. *The North-Eastern Rail. Co.* (above, p. 233):—"It is no misdirection not to tell the jury everything which might have been told them. Again, there is no misdirection unless the judge has told them something wrong or unless what he has told them would make wrong that which he has left them to understand. Non-direction merely is not misdirection, and those who allege misdirection must shew that something wrong was said or that something was said which would make wrong that which was left to be understood." Every summing-up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and for the defence respectively. This Court does not sit to consider whether this or that phrase was the best that might have been chosen, or whether a direction which has been attacked might have been fuller or more conveniently expressed, or whether other topics which might have been dealt with on other occasions should be introduced. This Court sits here to administer justice and to deal with valid objections to matters which may have led to a miscarriage of justice (*a*). Its work would become well-nigh impossible if it is to be supposed that, regardless of their real merits or of their effect upon the result, objections are to be raised and argued at great length which were never suggested at the trial and which are only the result of criticism directed to discover some possible ground for argument. The judgment of the Court must be that the appeal must be allowed and the conviction quashed.

Conviction quashed.

Solicitors for the Appellant: *Alpe & Ward.*

Solicitor for the Respondents: *The City Solicitor.*

(*a*) Cf. p. 207, above.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE GRANTHAM AND MR. JUSTICE JELF.

THOMAS JENKINS.

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Thomas Jenkins.

If a jury is directed properly, whether liability is civil or criminal, the Court will not interfere.

This was an appeal from an order of Mr. Justice Jelf refusing leave to appeal against conviction and bail, and an application for leave to call further evidence.

The appellant was indicted before the Deputy-Chairman at the County of London Sessions on May 12th, 1909, for horse-stealing. He was found guilty and sentenced to six months' imprisonment in the second division.

C. A. H. Black for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. Appellant was charged with having stolen a dark bay mare, the property of a Mr. Davies, a provision dealer carrying on business at Hoxton. On April 3rd the appellant, who had previously bought and sold horses for the prosecutor, went to Mr. Davies and asked him whether he would sell two horses he then had to a friend of the appellant's. The appellant was told to bring the proposed purchaser and the money on the 5th, when the matter would be considered. However, on Sunday, April 4th, the prosecutor, in consequence of what he had heard, went to the house of a Mr. Tankard in Pearson Street, where he found the appellant and the mare in question. The prosecutor took the mare home, telling the appellant that he would have nothing more to do with him, and that he was not to touch the horses again. On Monday, the 5th, the appellant again tried to persuade the prosecutor to sell the mare, but was told that she was not for sale. On Thursday, the 8th, when the prosecutor was away, the appellant went to the stables, and, telling the foreman stableman that he was merely taking the mare to have her feet trimmed, he took her away and sold her to a Mr. Kirkham for £11. The defence put forward was that a partnership existed between the

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prosecutor and the appellant; that the appellant had previously sold the prosecutor's horses on commission, and that he sold the mare to Mr. Kirkham believing that he had a right to sell when he could, and that the whole thing was an authorised partnership transaction. The appellant alleged that the reason why the prosecutor had sworn that he (appellant) had no authority at all to sell the mare was to punish him for not paying him money which he owed. It was true that he had not paid half the purchase-money to the prosecutor, but this created only a civil liability. It was desired to call further evidence to prove that—

(a) the appellant did not make the alleged statement to the stableman, and that the latter knew that the appellant was taking the mare to shew it for sale;

(b) and that the prosecutor was on friendly terms with the appellant and allowed him to deal with his horses after the alleged dismissal.

Appellant's witnesses, after attending at the previous Sessions, were not present when wanted.

The Lord Chief Justice: This is an appeal from a refusal of my brother Jelf to grant leave to appeal against conviction. We have had to point out from time to time that this Court does not sit to try cases over again. The jury were properly directed that if there was only a question of a civil debt there would be no criminal liability. The appellant, however, kept the bulk, if not all, of the money, which was the proceeds of the sale of the mare. The prosecutor gave evidence that he had told the appellant emphatically that he was to have nothing more to do with his horses, and in spite of that, by telling a lie to the stableman, the appellant succeeded in taking the mare away. The jury had the witnesses before them, and they had an opportunity of judging the truthfulness of their evidence. With reference to the further evidence which it is desired to call, there is no ground for saying that the appellant had no opportunity of calling these witnesses at the trial, and therefore leave must be refused. Having regard to the evidence, it is impossible to say that there was any miscarriage of justice, inasmuch as the appellant did in fact take the mare away and retained the money.

Applications dismissed. Sentence to run from date of conviction.

CHARLES BAKER.

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Charles Baker.

If a co-prisoner does not apply to be tried separately, no objection on the ground of a joint trial will be entertained by this Court.

This was an appeal from an order of Mr. Justice Jelf refusing leave to appeal against conviction, and bail.

The appellant was convicted before Mr. Justice Darling at the Central Criminal Court on May 19th, 1909, of rape, and sentenced to five years' penal servitude.

Laurie for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. Although the appeal was an appeal upon fact, yet it involved a question of law. The appellant Baker was indicted with a man named Dove, both charged with the rape of a girl named Raymond. Both men were tried together, despite the fact that the crimes, if committed at all, were entirely separate and distinct. Dove was acquitted, but the hearing by the jury of the evidence against both prisoners at once, prejudiced the trial as far as the appellant was concerned.

[The Lord Chief Justice: The point ought to have been taken at the time.]

The great injury appellant suffered in the trial was the attack made upon him in the final speech of counsel defending Dove. With reference to the question of fact, there was evidence given on both sides, and with regard to that evidence it was more accurate to say that the verdict could not be supported by it, than to suggest that the verdict was unreasonable. There was no satisfactory corroboration as to the time when the appellant was with the prosecutrix, and although an attempt or perhaps even the full crime was admitted, the real question was whether the prosecutrix consented. It was proved that she was in the company of a prostitute on the night in question, April 26th, 1909. Two witnesses were called at the trial who were friends of the accused man Dove. The learned judge, in summing up, assumed that they were friends of the appellant, and were arranging their evidence in such a way as to secure the acquittal of both the accused. As a matter of fact, those witnesses were endeavouring to assist Dove, which could be more easily done by throwing the whole of the blame on appellant.

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The Lord Chief Justice: The case was in some respects peculiar. The fact that the man Dove was acquitted ought not to affect our minds when investigating the case against the appellant. Very possibly the prosecutrix had before this got into bad company, and very possibly she is a girl who might very easily be led away. However, there was conclusive evidence to shew that she was not a prostitute, but was *virgo intacta*. It was stated in evidence that loud screams were heard after the appellant had gone into the hayloft where the prosecutrix had been taken, and shortly afterwards the girl was found utterly prostrated, and in a serious condition. She had obviously been subjected to great violence, and her crying was not the crying of a girl who is sorry for having done wrong, but that of a woman who had suffered a severe shock. The evidence as to time is correct, and it is impossible to suggest that there was no substantial case against the appellant. As to the question of prejudice, no objection was taken at the trial, and, in any event, there was no ground for any such objection. Many of the acts which constituted the crime happened when both Dove and the appellant were together upon the scene. The sentence may run from the date when this appeal ought first to have been heard.

Application dismissed.

John Ferguson.

JOHN FERGUSON.

Cross-examination as to previous convictions.

This was an appeal from an order of Mr. Justice Jelf refusing leave to appeal against conviction and sentence, and an application for leave to call further evidence.

Appellant was convicted before the Chairman at Preston Quarter Sessions on May 19th, 1909, of larceny, and sentenced to twelve months' imprisonment with hard labour.

F. G. Brocklebank for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. Appellant was convicted of stealing four pamphlets from a Roman Catholic Church. The appeal was upon the ground that there had been a miscarriage of

justice owing to the appellant having been cross-examined as to previous convictions.

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[The Lord Chief Justice: But he gave evidence of his own good character.]

Appellant went into the box, and after having said he was a Roman Catholic, asked to read a letter, which was allowed. In the letter the appellant stated that he bought the books for one penny each when he was in the church saying his prayers; that he had attended mass and service for over thirty-six years, and that he had "never taken any article from his Faith." The letter shewed that he was a member of several religious societies.

By his statement he never intended to put his character in issue —it was merely an appeal to the Court in his defence, and he should not have been cross-examined as to previous convictions. As his story was that he bought the pamphlets, it was possible that the jury would have returned a verdict of not guilty had their minds not been prejudiced by the cross-examination.

[The Lord Chief Justice: If a prisoner merely calls the prosecutor or one of his witnesses a liar, we have ruled that his character cannot forthwith be attacked, but this is different.]

Grantham J.: In this case there is no ground whatever for granting leave to appeal.

Application dismissed.

FRANK MALVISI (*a*).

Frank Malvisi.

Further evidence—If a defendant does not give evidence at the trial, the rule is that he cannot be called in this Court.

An appellant-witness must be called first.

Insufficiency of time between committal and trial to prepare the defence is a ground for granting leave to appeal.

Norris Foster for the appellant (under sect. 10 of the Criminal Appeal Act), who was present, asked leave to call the appellant, although he was not called at the trial.

(*a*) See p. 192, above.

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[The Lord Chief Justice: No leave has been given. It must be understood that it will only be in an exceptional case that leave will be given to call an appellant who did not give evidence below, and such a witness must be called first.]

The appellant, examined, said: I have a stand at the junction of Cattell Road and Coventry Road, Small Heath, and I attend by night with my hot potato machine. On Friday night, April 23rd, 1909, I was in my usual place from 6 p.m. to 11.30 p.m. That is a mile away from where the robbery was committed. I never left my stand, and know nothing of the robbery.

Cross-examined: I left my machine for about two minutes on two occasions. I have had my stand for two years. It was my father's before for twenty-five years, and I assisted him.

William Richards: I saw appellant by his potato machine between 8.30 p.m. and 9 p.m. I know him by sight, and I nodded to him.

John Keegan: I saw appellant on the night of April 23rd with his machine. I subsequently read of his arrest in the paper and so came to give evidence.

Charles Clarke, *Ernest Johnson*, *Fred Hadley*, *Joseph Bailey*, *Ferdinand Wichello*, *Ernest Henry Bird* all corroborated the appellant's statement. They had all seen the report of his conviction in the evening newspaper of the 27th.

Whadcoat, for the Crown: The whole question was as to whether the Court believed the evidence given.

Jelf J.: The appellant was indicted for having stolen a satchel from the person of a Mrs. Shotter. In giving evidence Mrs. Shotter said that she and a Mrs. Clarke were walking in the street together about 8.30 p.m. when a man came up from behind and punched Mrs. Shotter in the side. She fell to the ground and her bag was taken. Both ladies on the 26th identified the appellant as the man who had robbed them. The appellant from the moment of his arrest asserted that he was with his cart at the material time, and gave evidence and called one witness both at the police-court and the trial to his *alibi*. The circumstance which led the Court to grant leave to appeal was the rapidity with which the trial came on. It appeared that the robbery was committed on Friday,

23rd April, the appellant was arrested on the 25th, committed for trial on the 26th, and tried and convicted on the 27th. It was impossible for him in those circumstances to obtain the witnesses who have been forthcoming to-day. Having heard those witnesses we think the *alibi* is a satisfactory one, and that, in the face of that body of evidence, there would have been an acquittal.

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Conviction quashed.

Solicitor for the appellant: *J. Hall-Wright*, Birmingham.

THOMAS KIRKHAM.

Thomas Kirkham.

If there is sufficient corroboration of an accomplice's evidence, the Court will not interfere, despite the want of a proper caution to the jury, if there is no reason to fear a miscarriage of justice.

When the defence is an alibi *but is not set up before the magistrate, or the defendant does not give evidence, the Court is reluctant to interfere.*

This was an appeal against conviction, leave having been granted by Mr. Justice Jelf.

Appellant was convicted before the Chairman at Preston Quarter Sessions on May 19th, 1909, of larceny and receiving, and sentenced to twelve months' imprisonment with hard labour.

T. C. P. Gibbons for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. The appellant was one of six men employed in moving the prosecutor's furniture from Blackburn to Blackpool on March 30th, 1909. According to the evidence of a woman named Janet Smith, a few days after the removal, the appellant met her in a lodging-house at Preston, and asked her to pawn a gold watch for him. This watch the prosecutor identified as his property, and swore as to seeing it safe in his house at Blackburn on March 30th, but missed it the next day. The woman Smith gave evidence to the effect that the appellant came with her to the pawnshop, but stayed outside while she went in to pledge the watch. While she was in the shop, a detective came in. This detective swore that he never saw the appellant outside the shop, thus contradicting the woman's story. Other than the woman Smith's evidence, there was nothing to prove that the appellant was at the lodging-house at all. The grounds of appeal were, first, that this woman Smith was an accomplice and that there was no corroboration of her story; and that the jury were never

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cautioned as to her evidence. The watch was a valuable one, worth nine guineas, and therefore the woman, in pawning it, must have known that it had been come by dishonestly. Even if there was no evidence to convict her as a thief, there was ample evidence against her as a receiver of stolen property on her own shewing.

Secondly, facts had been admitted against the appellant which were not evidence. He called one or two detectives to prove he was elsewhere at the time he was supposed to have been at the lodging-house in Preston. The appellant had answers put upon him by these witnesses, who did much more than answer the questions asked. Such answers were inadmissible, and they ought not to have been allowed to be given. Objection in particular was taken to answers given by the witnesses relating not to facts within their own knowledge but mere matters which they had ascertained by questions and inquiries addressed to persons outside the case. In answer to the appellant's question whether he had seen him outside the pawnshop, the detective said he had not, and then added, "I should have known you if I had seen you." That answer implied that the appellant had been previously convicted, or was at least known to the police.

[The Lord Chief Justice: The appellant did not go into the witness-box himself, although his real defence was an *alibi*. We have commented on that in this Court before.]

Thirdly, there had been a misdirection, not only in the omission to warn the jury as to the evidence of an accomplice, but also because the jury were not told that the prosecution had to prove their case. The prosecution had in fact proved no case at all.

J. Hodgson, for the Crown: There was no evidence to support the suggestion that Janet Smith was an accomplice, and if she was, she was corroborated. The *alibi* was unsupported. The *alibi* was never set up before the magistrates, otherwise inquiries might have been made. On April 1st the prosecutor met appellant in Blackpool. Having then missed his watch, he asked the appellant to come with him to a police station. Appellant assented, but when they came to some buildings the appellant, saying that he wanted to call there a moment, entered the premises and disappeared.

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Gibbons, in reply: As to the running away, the appellant had been taking part in the removal of furniture, and then suddenly to be asked to go to the police station by the owner of the house amounted to an accusation of some kind or other. The prosecutor, unlike a constable acting on suspicion, had no power to compel the appellant to go to the police station, and there was no reason why the appellant should consent to such an expedition.

The Lord Chief Justice: In this case I have to deliver the judgment of the Court. The watch which was stolen was last seen by its owner, the prosecutor, on March 30th, 1909. Nothing more is known until April 2nd, when a woman named Janet Smith is found in possession of it, attempting to pawn it. She said she had seen the appellant in a lodging-house at Preston, and that he had asked her to pawn it for him. If Janet Smith is to be treated as an accomplice, then some caution ought to have been given with regard to her evidence—that has been clearly established. If, however, there was substantial corroboration of her story, this Court will not interfere, even if there was not sufficient caution, unless the omission of a caution has led to a miscarriage of justice, which is not the case here, in view of the real issue in this case. We do not, however, think it right to deal with this woman as an accomplice. It is true that she is a person not likely to have a valuable watch, but when people try to pawn stolen property they often send others to do it. The only evidence as to her being an accomplice is that she was asked by the appellant to pawn the watch. She is not connected with the original removal of the goods or with the people who, it is suggested, had an opportunity of taking the watch, which took place at Blackburn. Therefore there is not sufficient evidence to make her an accomplice. There is, however, a further objection. I think the absence of any caution as to an accomplice is accounted for by the fact that the only substantial defence was that the appellant was not at Preston, but at Blackpool, when he is supposed to have given the watch to Janet Smith in the lodging-house at Preston. Appellant was not defended by counsel, but the questions he put shewed that he understood what he was doing for his own advantage. We have said before in this Court that people who set up an *alibi*, and do not go into the box, are not entitled to come here and rely upon that defence. Nor was there any suggestion of an *alibi* at the

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police-court, and we have already said (*a*) that such a defence ought to be raised at the earliest possible moment. The main question at the trial was this one of an *alibi;* hence the probability or improbability of Janet Smith being an accomplice became a secondary matter. There was substantial corroboration of Janet Smith's story, and it is to be found in the detective's evidence when examined by the appellant, who called him as his witness. When asked what statement Smith made to him when he was in the shop, he said, "I asked her from whom she got the watch; she said, 'From Hornby, in such-and-such lodging-house, and he sent me to pawn it.'" The appellant was identified as that man. That statement could not have been elicited by the prosecution, but a jury might well accept it as corroboration. It is true that it would have been wiser for the Chairman to point out that some of the answers went beyond the questions put, but in view of the fact that appellant was only striving to establish an *alibi*, that might not have occurred to the Chairman. I hope no rule will be laid down here that when a defendant, who knows his own case, asks for a statement, the judge shall say, "No; it is not evidence"—such a statement may well serve an innocent man. There is a further point. It has been said that any one of the other persons engaged in the removal might have been mentioned by Janet Smith, and there would have been no more evidence against them than against the appellant. The significant fact is that Janet Smith, even at the police-court, never mentioned any name other than that of the appellant, and she was never cross-examined by him in a single question as to the truth of her statement that he went by the name of Hornby and stayed at the named lodging-house. In these circumstances Janet Smith cannot be held to be an accomplice, and the want of direction could not have affected the verdict of the jury. In cases like these, where the accused has not submitted himself to cross-examination, only the strongest circumstances will justify an interference by this Court. In this case the alleged misdirection or non-direction could not substantially have affected the verdict.

Appeal dismissed.

(*a*) 1 Cr. App. R. 130, 240; 2 Cr. App. R. 21.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE A. T. LAWRENCE AND MR. JUSTICE JELF.

JOHN EDMUNDS.

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John Edmunds.

Murder—Upon a proper direction, it is for the jury to say whether violence caused or accelerated death—A deposition taken on a charge of shooting or wounding anyone with intent, may be used on the trial of the accused for murder of that person—Beeston's *and* Lee's *cases followed.*

This was an appeal against conviction, on points of law and fact, upon a certificate granted by Ridley J., before whom appellant was convicted of murder at Monmouth Assizes on June 7th, 1909. He was sentenced to death.

S. R. C. Bosanquet for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. The appellant was charged with the murder of a woman named Harris, committed on February 20th, 1909. Mrs. Harris was a woman fifty-nine years of age, who lived alone in a farm in Monmouthshire. It appeared that appellant attacked her with a gun, shot her in the mouth, causing lacerated wounds and a fracture of the jaw, assaulted her, and then cut her throat. Mrs. Harris, who was a woman of vigorous constitution, managed, in spite of her injuries, to crawl to a neighbouring farm three-quarters of a mile away. She was removed to a hospital, and recovered sufficiently to give evidence at Pontypool Petty Sessions on April 23rd, 1909. She died on May 5th, 1909. The medical evidence shewed that she died from heart failure, attributable indirectly to septic poisoning. There were two grounds of appeal; First, the admission of certain depositions (which it was not intended to pursue); and second, that the medical evidence at the trial did not establish that the woman died in consequence of appellant's acts. It is agreed that where a jury has heard the whole of a case, there is difficulty in supporting an appeal against conviction. In this case, however, the jury, who were doubtless prejudiced by the horrible nature of the offence, were not able to appreciate the importance of the medical evidence.

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The deceased, in fact, lived for nearly three months after the outrage upon her, and it was given in evidence by the doctor that the post-mortem examination of the body revealed a fatty degeneration of the heart and diseased kidneys, which alone might have been the cause of death. In any event, the case was a difficult and doubtful one, and justice could more easily be done if the Court were to appoint an assessor under sect. 9 (e) of the Criminal Appeal Act, 1907, who would be able to assist the Court in forming a conclusion upon the medical evidence in the case.

Cranstoun (with him *A. J. David*), for the Crown, was not called upon.

The Lord Chief Justice: It is important to point out that this Court is not acting in the capacity of the Home Secretary, but has merely to deal with the correctness or incorrectness of the conviction. Two points were raised at the trial. Although the first point has not been persisted in upon appeal, we think it desirable that some mention should be made of it. The original charge against appellant was one of wounding with intent, the woman being then alive. Her deposition was taken in respect of that charge, the doctor allowing her to attend the police-court for that purpose. That deposition was afterwards admitted in evidence upon the charge of murder which was subsequently preferred against appellant. It was objected at the trial that this evidence was wrongfully admitted, having regard to the fact that the deposition of the deceased was taken for one purpose and used for another. We think that the evidence was rightly admitted. The question has already been decided. (*Beeston*, Dearsley & P. C. C. 405; 3 C. L. R. 82; 24 L. J. M. C. 5; 18 Jur. 1058; 3 W. R. 56; 6 Cox, C. C. 425; 1854; *Lee*, 4 F. & F. 63; 1864.) If, in this case, it could be suggested that there was any misdirection, other considerations would follow, but the real question is whether or not the death of the deceased was caused by appellant's acts. It is clear that if the injuries accelerated the death, the question whether the deceased was in a weak state of health at the time they were inflicted is immaterial, and that the appellant would be guilty of murder. It seems to us that, having regard to the nature of the injuries, it is impossible to say that there was not evidence upon which the jury could come to the conclusion that death was substantially accelerated by

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the wounds inflicted. There was some medical evidence given to the effect that the deceased might have lived had it not been for the wounds that she received. Apart from the question as to what may have been the actual cause of death, the jury had affirmative evidence before them that the deceased might have lived a long time, and that death was caused by septic poisoning of the wounds. Whatever may be the view of another authority as to the carrying out of the sentence, having in view the length of time the deceased lived, it is not our province to deal with this appeal otherwise than upon the points of law.

Appeal dismissed.

EDWIN ARMITAGE GREGORY WELLS.

Edwin Armitage Gregory Wells.

Severity of sentence—Sentence on an indictment for falsification of a marriage register ought not to be affected by an allegation of bigamy charged in another indictment but withdrawn.

This was an appeal against conviction and sentence, leave having been granted on June 11th by the full Court, to whom the application had been referred by Jelf J. Appellant at the same time was granted leave to be present.

The appellant was convicted before Mr. Commissioner Rentoul at the Central Criminal Court on May 21st, 1909, of falsification of a marriage register, and sentenced to two years' imprisonment with hard labour.

Lawless for the appellant (under sect. 10 of the Criminal Appeal Act), who was present. Two indictments were originally preferred against appellant. The first of these, which was an indictment for bigamy, was not proceeded with owing to the fact that at the beginning of the trial the prosecution stated that there was no evidence forthcoming that the appellant knew that his first wife was alive at the time of his second marriage. The appellant was married on August 26th, 1876. Within two years his wife left him. On July 30th, 1890, he contracted the second marriage. He lived sixteen years with the second wife, who eventually left him in 1906. Much evidence as to the appellant's antecedents was admitted which was really inadmissible on the ground of irrelevancy. The second wife gave evidence to the effect that owing to a warning post-card which her father had received, appellant was asked to go

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down to her home in Norfolk just before the marriage. She affirmed that appellant, on being questioned about his previous career by her father, stated that he had never been married before. In cross-examination she admitted that she had not heard this conversation, but had been told about it subsequently. A woman was produced in Court who was said to be the first wife. The appellant failed to recognise her at all, although she claimed a knowledge of him.

It was suggested that this woman had been ill-treated by the appellant for a period of two years, but this he denied on oath. Following upon this evidence, and whilst the prisoner was in the box, the jury gave it to be understood that they were prepared to convict. The learned Commissioner, however, told them that they must hear fully the evidence for the defence. When the prisoner had finished his evidence, the jury at once, and without receiving any direction or warning as to the law from the learned Commissioner, found him guilty of making a false entry in the marriage register on the occasion of his second marriage. He had in fact described himself in the register as a bachelor, instead of a widower. It was necessary, however, that the prosecution should prove that this was done with a guilty intent.

A. F. Henderson, for the Crown: The offence was committed knowingly and wilfully.

The Lord Chief Justice: In this case we do not think that we ought to allow the appeal against conviction. There are cases where a misstatement in a marriage register might be very material. We must, however, be careful not to punish appellant for another offence. The original marriage was nineteen years before the second marriage, and the prosecution elected not to proceed upon the indictment for bigamy. The only ground of conviction was the falsification of the register. It is quite possible that it might have been an innocent mistake. In these circumstances, it is impossible to say that the sentence in this case is justified. It is clear that the learned Commissioner did not sentence appellant upon the misstatement, but took a strong view of his general conduct. We think he has been imprisoned long enough, and he may therefore be discharged.

Sentence reduced.

EDWARD CLAYDON.

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Edward Claydon.

Identification.
Severity of sentence.

This was an appeal against conviction and sentence, leave having been granted by Mr. Justice Bray, and an application for leave to call further evidence.

Appellant was convicted before the Chairman at Essex Quarter Sessions, on May 27th, 1909, of housebreaking, and sentenced to twelve months' imprisonment with hard labour.

Warburton for the appellant (under sect. 10 of the Criminal Appeal Act), who was present. Appellant lived in Maida Vale. On Good Friday, April 9th, 1909, he went with his wife and family to Southend, alighting at a station just outside that town. On that afternoon, at about 3.15 p.m., a house at the corner of Harcourt Avenue and Colchester Road was broken into. The owner of the house gave evidence to the effect that he was lying down at that time, when somebody entered the room. He was reading at the time, and owing to short-sightedness was using double glasses; but he professed to identify the person who entered the room, who, having said, "I've seen the missus; it's all right," disappeared. Prosecutor gave the alarm to two men who were passing, and who started in pursuit about twenty yards behind a man who was seen coming away from the premises and was pursued down Colchester Road by the two men, who gave evidence at the trial. A chase ensued in which the man out-distanced his pursuers. It was unlikely that appellant, who was middle-aged and stout, had he been the man pursued, could have gained on the men following him, who were young and active. The two witnesses eventually lost sight of the man they were following. Shortly afterwards appellant was seen to go up a yard, and was subsequently found in a lavatory in a heated condition. There was evidence that he had not used the lavatory. On coming out he said, "I am not the man." That remark might be accounted for by the fact that he had overheard some women say that their children had been frightened by a man running up the yard. Appellant then rejoined his wife and child, and afterwards went to the police station, offering no objection, although the persons accompanying him had no power

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to compel him to go. Appellant was anxious to call his wife and a sergeant of police as witnesses. His own case was that he left his wife in order to find a lavatory, which took him some time to discover. It was improbable that appellant, who was a man of exceptionally good character, should travel from Maida Vale to Southend to commit an offence of this kind, and quite possible that the real culprit had got away over a fence which bordered some waste land. In any case, the sentence was too severe.

A. T. Lawrence J.: This case was well conducted at the trial, and the evidence points conclusively to appellant's guilt. It is suggested that the case involves a question of mistaken identity, but any doubt as to identity is displaced by the evidence of no less than five witnesses, who are positive that appellant is the man they saw that day. The circumstances of the chase and the condition of appellant when found in the lavatory confirm them and render a mistake impossible. There is no ground for the suggestion, and the sentence inflicted was a proper one.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING, AND MR. JUSTICE A. T. LAWRENCE.

WALTER DAVIS.

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Walter Davis.

Murder—Circumstantial evidence—In reviewing the facts one test for the Court is, How would an innocent person have acted?

This was an appeal from an order of the Lord Chief Justice refusing leave to appeal against conviction and to call further evidence. The appellant was convicted of murder, before Mr. Justice Bucknill at York Assizes on June 11th, 1909, and sentenced to death.

C. Milton Barber for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. The appeal was on the ground of misdirection, and that the verdict was unreasonable. The charge against the appellant was of the murder of a Mrs. Richards, with whom he had lodged in 1907. At that time she was living with her husband at Northallerton, but went away with the appellant to Leeds, and afterwards to Ilkley, where they lived as man and wife. The husband, however, on March 30th, 1909, was again living with her at Middlesbrough, the appellant remaining as a lodger. On that morning the husband went out, leaving her, appellant, and another lodger named Mussel, at home. Mussel left the house shortly before 8.30 a.m., and appellant was seen to go out about 8.50 a.m. According to his account, he went to the post office, where he spoke to a female official, and having bought some steak and some whiskey, he returned to the house at 10 a.m. He was unable to say where he bought the provisions. On his arrival home he went upstairs and found the deceased dead in her bed. He was so upset at the discovery that he went away at once, without informing anybody of what had happened. He was arrested in Northumberland on April 17th, 1909. Stains were

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found upon his clothing which were certified to be blood stains, but appellant accounted for these by saying that on the evening of his arrest, when he was at the constable's house, before being taken to the station, his nose commenced to bleed. This was denied by the constable.

[A. T. Lawrence J.: One of the grounds of appeal is that the stains on the clothing are not human blood.]

The doctor's evidence as to the blood being human was not certain. No suggestion was made at the trial who killed the deceased if appellant did not. A certain amount of evidence was wrongfully admitted, inasmuch as it was said that the missing part of a newspaper found upon appellant when arrested contained his portrait and a list of the various names under which he passed. This was never proved. It was desired to call the post office official to whom appellant had spoken on the morning in question, and a man from Middlesbrough.

The Lord Chief Justice: In this case there was overwhelming evidence against the appellant. No one, except him, was in the house or its vicinity when the murder must have been committed. There was evidence that previously there had been quarrels between the deceased and the appellant, which was in part admitted by the appellant himself. According to his story, he went back and found the woman dead, and went away immediately without giving any alarm. He afterwards passed under different names. The test to be applied is, how would an innocent man have acted in such circumstances? Upon the evidence before them, we do not think that the jury could have come to any other conclusion. The summing-up was most accurate, and there is no ground for suggesting that it contains any misdirection. The further evidence desired to be called merely relates to what happened after the arrest, with the exception of the evidence of the post office official. There was no suggestion that anybody else committed the murder, and we see no ground for interfering.

Application dismissed.

WILLIAM ROSE.

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William Rose.

Sect. 5 (2) of the Criminal Appeal Act, 1907.
Point of law not taken by prisoner's counsel at the trial.

This was an appeal on a point of law against conviction, an application for leave to appeal on the facts having been referred to the full Court by the Lord Chief Justice.

The appellant was convicted before the Deputy-Chairman at the County of London Sessions on June 10th, 1909, of larceny, but sentence was respited in view of this appeal.

Jelf for the appellant (under sect. 10 of the Criminal Appeal Act), who was present. On March 18th, 1909, a Mr. Head sent three postal orders to the prosecutors, who were a firm of solicitors. The prosecutors, finding that the money had been paid, gave the postal orders to a clerk to give to appellant to return to Mr. Head, and it was one of these orders that he was charged with stealing. In pursuance of the instructions given, the postal orders were handed to appellant to deliver, and he must, therefore, be considered to have received them innocently. If any offence was subsequently committed by appellant in respect of the orders, the offence must have been one of larceny by a bailee. The Deputy-Chairman thought that it was a question of receiving stolen property, and having wrongly framed the charge in his own mind, a misdirection to the jury followed. The misdirection in itself was unimportant, but it explained how the Deputy-Chairman came to admit evidence which was wrongly admitted, inasmuch as a police-sergeant who was called on behalf of the prosecution, having been asked in cross-examination whether he found a postal order on appellant, was asked in re-examination whether he found anything else. In reply the witness produced other articles which might have prejudiced appellant's case. Such evidence would have been admissible if it was a case within sect. 19 of 34 & 35 Vict. c. 112 (the Prevention of Crimes Act, 1871), and it was clear that the learned judge thought this was a case of receiving. No notice had been given with regard to these exhibits, nor was there any mention of them upon the depositions. The witness went on to say that the articles in question had been identified by prose-

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cutor as stolen from him—a matter on which prosecutor's evidence would have been the best. It was true that counsel representing appellant at the trial said that he did not object, but the identification of the articles, supposed to be wrongfully in appellant's possession, was only hearsay, and appellant ought not to be prevented from raising the point on appeal.

[The Lord Chief Justice: It is impossible to allow points to be raised by counsel who were not present at the trial, which were not taken by appellant's counsel in the Court below. Very often a statement is admitted in the interest of the defendant.]

The hearsay identification was not assented to, although no objection was taken to the production of the articles.

Whiteley, for the Crown, was not called on.

The Lord Chief Justice: I referred this case to the full Court, not because I had any doubt, but because, as it must come to the Court on the point of law, it saved time to refer the application. There is not the slightest ground for interfering in this case. The prosecutors happened to keep the counterfoils of the postal orders, and it was proved that the appellant cashed one of them and used the money. It is suggested that the postal order came into the appellant's possession innocently, but it does not really matter whether the offence committed was larceny or larceny by a bailee, inasmuch as sect. 5 (2) of the Criminal Appeal Act applies to this case. By that section the Court, where an appellant has been convicted, and the jury could on the indictment have found him guilty of some other offence, has power to substitute a verdict of guilty in respect of that other offence, if it thinks that the jury were satisfied of facts which prove him guilty of it. It was in the appellant's interest that the articles were allowed to be produced, a procedure which was assented to by counsel then appearing on his behalf. We are of the opinion, therefore, that there is no ground for allowing the appeal upon the question of law, or for granting leave to appeal upon the facts.

Appeal dismissed.

ELIZABETH PERRY.

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Elizabeth Perry.

Murder—Dying declaration—The true test of admissibility is whether all hope of living has left the mind of the declarant.
Gloster's case *followed.*

This was an appeal against conviction on a certificate granted by Lawrance J., before whom the appellant was convicted at Warwick Assizes on June 16th, 1909, of murder and sentenced to death.

Maddocks for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present.

The appellant was convicted of the murder of a girl named Agnes Margaret Summersby, aged twenty-four, upon whom, it was alleged, she had performed an illegal operation. On April 9th, 1909, the deceased was four months gone in pregnancy. On Good Friday, April 9th, 1909, she left home in good health, returning late the same day. On the following day she became sick, and the appellant was sent for. On April 14th, 1909, the deceased had a miscarriage, and by April 16th, 1909, her condition had become so serious that the appellant advised that a doctor should be called in. Consequently at 1.30 a.m. on that day Dr. Smith was summoned, and, having made an examination, told appellant, who was in the room, that the girl might die at any moment. At the trial the prosecution alleged that, although Dr. Smith spoke in a subdued voice, the deceased must have heard what he said, and therefore knew of her critical condition. There was nothing, however, to shew that the deceased did in fact hear what was said, for she never spoke, and the acute pain which she was then suffering would render her unconscious of what was going on around her. At about 9.30 a.m. the same day the deceased's sister Gertrude went upstairs and laid on the bed beside her. In reply to a remark which the sister made about not liking appellant, the deceased said: "Oh, Gert! I shall go; but keep this a secret, let the worst come to the worst." She then went on to relate the details of the operation performed upon her by appellant on April 9th, 1909. An hour and a half later another doctor was called in, to whom the deceased accounted for her condition by saying that she had been frightened by a horse kicking and plunging in the street. Appellant really volunteered

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the explanation, but the deceased, hearing what was said, adopted it as her own and added the details. She died at about 5.30 p.m. on the same day. The statement made to the sister by the deceased was tendered in evidence by the prosecution as being a dying declaration and admitted. Assuming that the deceased had not heard what Dr. Smith said at 1.30 a.m. that morning, she could not have known what condition she was in. It was by no means conclusive that the deceased thought she was about to die when she made the statement to her sister, inasmuch as an hour and a half later she gave an untrue account of the way the miscarriage was caused to the second doctor, Dr. Haines, viz., that she had been frightened by a horse. The nearer the dissolution the stronger the tendency to speak the truth. That was the assumption upon which dying declarations were admitted. It was possible that the words used might mean that the deceased expected death very shortly, but it was also possible that they might have meant that she was uncertain as to recovery, but that, whether she died or not, her secret should be preserved. Where there were two possible meanings, that *in favorem vitae* must be adopted. (*Jenkins*, L. R. 1 C. C. R. 187; 11 Cox C. C. 250; 20 L. T. 372; 17 W. R. 621; 1869.) The principle upon which dying declarations were admitted was stated by Eyre, L.C.J. in *Woodcock*, 1 Leach 502; 1 East P. C. 354 (1789), where he said: ". . . . the general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice." The learned judge at the trial admitted the statement as a dying declaration, relying upon the fact that there was a Court of Criminal Appeal. He, in fact, said: "If it were not for that, I should refuse." Great caution had hitherto been exercised by judges in such cases. (*Forester*, 10 Cox C. C. 368; 4 F. & F. 857; 1866.) Mr. Justice Byles said in *Jenkins* (above), that declarations ought to be admitted with "scrupulous and almost superstitious care."

[The Lord Chief Justice: We think that Mr. Justice Byles

went too far when he said in *Jenkins*, "The result of the authorities seems to be that the dying person must be under the impression that his or her death is almost immediately impending."]

Mr. Justice Charles said in *Gloster*, 16 Cox C. C. 471 (1888), "There must be an unqualified belief in the nearness of death; there must be a belief without hope in the declarant that he is about to die." The deceased, an hour and a half after the statement was made, gave a different and untrue account of how the miscarriage was caused. This rebutted the presumption that the deceased thought she was dying when she made the statement to her sister. It ought therefore not to have been admitted. He referred also to *Abbott*, 67 J. P. 151 (1903), where Kennedy J. refused to admit a statement of the deceased though she had repeatedly said "I'm dying," on the ground that the words might only be the expression of great pain.

Ryland Adkins (*Stephen Foster* with him) for the Crown. The interpretation of the words must depend upon them all. The essential point was what was the state of mind of the dying woman. (*Peel*, 2 F. & F. 21 (1860), *per* Willes J.; *Whitmarsh*, 62 J. P. 680, 711; 1898.) Death was impending when Dr. Smith and when Dr. Haines saw the deceased. There was sufficient evidence against the appellant apart from the dying declaration. The evidence shewed that her conduct throughout was secretive. The words "I shall go, &c." were made quite voluntarily to a near relative.

[Darling J.: The words, "Let the worst come to the worst," must have referred to her own death. They could not have referred to the prosecution of the appellant, because the deceased said, "But keep this a secret."]

Maddocks, in reply. A mere sense of danger in the deceased's mind was not enough to render the statement admissible. He referred to Archbold's Criminal Practice, 23rd ed. p. 322.

Misdirection was also alleged on the ground that the statement was the statement of an accomplice, and the jury were not sufficiently warned with regard to it. The defence, which was not left to the jury, was that the evidence of the sister, Gertrude Summersby, was not trustworthy, and that she gave it in order to shield her mother from suspicion.

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The Lord Chief Justice: In my judgment the principle to be applied in these cases could not be better expressed than it was by Chief Justice Eyre as long ago as 1789, in the case of *Woodcock* (above). It was there laid down with regard to dying declarations that they are "Declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone . . . ." The test is not whether the person making the statement is "at the point of death," although death, so far as there can be any certainty, must be imminent—the material point is that every hope of life must have gone in the mind of the person making the declaration. That has been recognised in one or two later cases. In *Peel* (above), it was held by Willes J. that it must be proved that the man was, in fact, dying, and there must be a settled and hopeless expectation of death in the declarant. That puts it clearly, and was the test applied by Charles J. in *Gloster* (above). In that case the authorities were reviewed, and the learned judge referred to his reasons for differing from and not following the judgment of Lush J. in *Osman*, 15 Cox C. C. 1 (1881). The principle as laid down in *Gloster* (above) to be applied to this case, is whether all hope of life had been abandoned. It is for the judge to admit the declaration if he thinks it is admissible. It is said that the learned judge admitted the declaration because this Court was in existence, but we have had an opportunity of communicating with Mr. Justice Lawrance, who informs us that there was no doubt in his mind that the deceased had abandoned all hope of living at the time she made the statement, and knew that she was dying. He thought, however, that this was a case in which it was desirable that this Court should enunciate a principle. The right view is that it must be determined, upon the evidence given at the trial, whether the person making the declaration had a settled, hopeless expectation of death. The expression "I shall go," might mean "I shall go some day," but taking all the words together, we think the declaration was admissible. As to the other points put forward with regard to pressure being brought to bear upon the sister, we think there is no ground for interference.

Appeal dismissed.

JOHN SMITH.

MATTHEW WILSON.

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John Smith.

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References by the Home Secretary.

Sect. 19 (a) of the Criminal Appeal Act—The Home Secretary may refer a question of sentence only to the Court.

27 & 28 Vict. c. 47, s. 9 (Penal Servitude Act, 1864)—Where a remanet *sentence has to be served, it should not be referred to in passing the subsequent sentence, as it operates by law.*

These were (separate) appeals against sentences, referred by the Home Secretary under sect. 19 (a) of the Criminal Appeal Act, 1907.

Vaughan Williams for the appellants (under sect. 10 of the Criminal Appeal Act), who were not present. The appellant Wilson was convicted (with one Fagan, p. 147, above) before the Recorder, at Newcastle Quarter Sessions, on April 2nd, 1909, of being in possession of house-breaking implements. He was sentenced to three years' penal servitude, to run concurrently with 245 days, the *remanet* of a previous sentence. The appellant Smith was convicted before the Chairman at Caermarthenshire Quarter Sessions, on October 23rd, 1908, and was sentenced to three years' penal servitude, to commence after a *remanet* of 318 days (1 Cr. App. R. 203).

By sect. 9 of 27 & 28 Vict. c. 47 (the Penal Servitude Act, 1864), it is provided that "Where any licence . . . . . is forfeited by a conviction of any indictable offence . . . . . or is revoked . . . . . the person whose licence is forfeited or revoked shall, after undergoing any other punishment to which he may be sentenced for the offence in consequence of which his licence is forfeited or revoked, further undergo a term of penal servitude equal to the portion of his term of penal servitude that remained unexpired at the time of his licence being granted. . . . ." Quarter Sessions, therefore, had no jurisdiction to pass sentence in the form in which they did. In *Hamilton* (1 Cr. App. R. 87; 1908), the Court had struck out the words "to run concurrently"; but it is submitted that the proper course is to quash the conviction. A conviction consists of two parts—verdict, judgment or sentence—and if either part is bad, the whole conviction is bad. Counsel referred to *Surrey Justices* (1892, 2 Q. B. 719; 61 L. J. M. C. 200; 56 J. P. 742; 67 L. T.

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266); *Vipont* (2 Burr. 1163; 1761); *Hawkes* (Str. 858; 1730). If the illegal words in the sentence were treated as mere surplusage, the effect would be that Wilson, at any rate, would have to serve a longer sentence than the Court intended to impose. Inasmuch as the sentences were referred to the Court under sect. 19 (a) of the Criminal Appeal Act, 1907, it was open to the appellants to appeal against their *conviction*. All grounds of appeal were, therefore, open to appellants. This is so although Smith had already (*a*) applied for leave to appeal against conviction, and had been refused. Under sect. 19 (a) the Home Secretary has power to "refer the whole case to the Court of Criminal Appeal, and the case shall then be heard and determined by the Court of Criminal Appeal as in the case of an appeal by a person convicted." The sentences given, being invalid, invalidated the convictions.

[The LORD CHIEF JUSTICE: No, the reference is only of the sentence. Smith has already appealed against conviction.]

The appeal was really not against the sentences, but against the convictions. Therefore, sect. 4 (3) of the Act does not apply, and the Court has no power to vary the sentences, but only to quash the convictions. If the Court has power to amend the sentence in a case like this, and the sentence then becomes valid, the course for convicted persons, where a wrong sentence is alleged, would be to apply for a writ of *habeas corpus*, rather than to appeal to this Court to amend the sentence.

Muir (with him *W. Llewelyn Williams* in the first, and *Lord William Percy* in the second, case) for the Crown. The sentences were legal if the Court should say that any words of the judges qualifying the operation of sect. 9 of the Penal Servitude Act, 1864, were surplusage. He desired the Court to say that while the judges had no power to alter the working of that section, the rest of the sentences passed by them were valid and would become operative immediately they were pronounced.

The LORD CHIEF JUSTICE: In this case there is no doubt as to what the decision of the Court should be, and we hope that it

(*a*) 1 Cr. App. R. 203.

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will afford a guide to those who have to deal with such cases. The appellants petitioned the Home Secretary against their sentences. Sect. 3 (c) of the Criminal Appeal Act, 1907, allows appeals against sentences, and sect. 19 (a) of that Act allows cases to be referred by the Home Secretary. Therefore, those persons who have petitioned against their sentences and are referred to this Court are appellants against sentences only, and we have power to alter those sentences under sect. 4 (3) of the Act. Now, in these cases the sentences ought to have been so many days or months without any reference to the *remanets* at all. What this Court has to do is to pass a proper sentence in each case, as was indicated in *Hamilton's* case. Smith was sentenced to three years' penal servitude, to commence after a *remanet* of 318 days. Following the principle we have enunciated, we pass a sentence of three years' penal servitude. Wilson was sentenced to three years' penal servitude, to run concurrently with 245 days *remanet*. If we were to strike out the words "to run concurrently" he would get more than he was meant to receive. Therefore, without any reference to the *remanet*, which by operation of law he may have to serve, we pass a sentence of eighteen months' imprisonment with hard labour.

Sentences amended.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING, AND MR. JUSTICE JELF.

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2 *July*.

William Hampton.

WILLIAM HAMPTON.

Murder—Prisoner not giving evidence.

This was an appeal against conviction. The appellant was indicted before Mr. Justice Phillimore, at Bodmin Assizes, on June 24th, 1909. He was found guilty, and sentenced to death.

R. G. Seton for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. The appellant was convicted of the murder of Emily Barnes Trevarthen Tredrea, a girl of seventeen years of age. The appellant had lodged in the house of the deceased girl's mother for nearly twelve months, during which time he had become very friendly with the deceased, and had become engaged to her. The appellant had expressed the intention of going to America for three or four years, and returning to marry the deceased when she attained the age of twenty. The appellant was a miner, and was in work at the time when the offence was committed. Mrs. Tredrea, in giving evidence, said that the appellant and the deceased had been on good terms with each other, although her daughter sometimes objected to the appellant's habit of using bad language. A few days before Sunday, May 2nd, 1909, she heard her daughter tell the appellant that she did not think she would go out with him any more, but no coldness or unpleasantness was noticed between them in consequence of what had been said. On the evening of that day, Mrs. Tredrea left the appellant and the deceased alone together in the house while she went to attend to the appellant's grandmother at her house, which was about five minutes' walk distant. After she had been there a few minutes, her little boy William, whom she had left in bed, came running to fetch her. When she arrived at her own house, she found her daughter sitting in a wicker chair—dead. The appellant was not there. The child William, nine years of age,

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said that after he had been in bed a little while on this Sunday night, he heard a rattling noise. He came a little way downstairs in his nightshirt, to a place where he could see into the kitchen. He there saw his sister, the deceased, upon the floor, with the appellant kneeling on her chest, and his two thumbs against her throat. He ran back to his bedroom and dressed, and on coming down the second time he found the appellant had moved the deceased to another part of the room, but was still kneeling on her chest with his thumbs to her throat. The appellant then lifted the deceased up and put her in the wicker chair, propping her up. The witness tried to get out at the door, but the appellant pulled him back. Eventually he succeeded in getting away, and, as he was running to fetch his mother, he heard the house door slam, and saw a man running away. Police-constable Roberts gave evidence to the effect that when he was on duty on Sunday night, May 2nd, 1909, the appellant came up to him and said: "Have you heard a girl has been choked at St. Erth?" to which he replied, "No." The appellant then went on to say: "There has been, and I am the one that done it; I may just as well give myself up. I believe she is dead, because she has gone dark and swollen." In another statement to another constable the appellant said: "She told me she had given me up. I felt mad; I caught her by the throat and held her till she was dead." These two statements were contradictory; therefore, the jury ought to have been directed that this "confession" could not be accepted. The appellant had hitherto borne an excellent character. The ground of the appeal was that the learned judge misdirected the jury, inasmuch as he did not sufficiently distinguish between the facts which pointed to manslaughter and those of murder. He did not point out that the crime was committed with a natural weapon, and that the appellant did not use a knife although there were table knives close at hand. The defence was, that in a moment of rage the appellant gave the deceased a grip which was more forceful than he knew. Moreover, the learned judge commented far too strongly upon the fact that the appellant did not go into the box to give evidence on his own behalf.

Raymond Asquith (*Stafford Howard* with him), for the Crown, was not called on.

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The Lord Chief Justice: It is suggested that the learned judge should have dealt more fully with the question of manslaughter in the summing-up. Whether the direction upon that point was long or short, it was as favourable to the appellant as it could possibly be. We have to repeat that a summing-up is not a dissertation upon the law, but must have reference to the way in which each case has been conducted at the trial. It was also suggested that the evidence of the boy was unreliable, owing to inconsistent statements. I have not been able to discover the inconsistency, and as to the boy being only nine years old, I am often disposed to place more reliance upon an intelligent child than upon the considered evidence of older people. He actually saw what took place, and his story is corroborated by the doctor, who said that extraordinary pressure must have been used, and that death, which might have taken place in three minutes, was caused by asphyxia. The appellant subsequently ran away and made a statement. There is no ground for suggesting that the learned judge misdirected the jury, and with regard to the fact of his commenting upon the appellant's failure to give evidence, we can only say that the comment was in no way too pronounced. We have said more than once that when certain facts are proved by the prosecution, and the prisoner wishes to have a certain view of those facts accepted, it is incumbent upon him to give evidence with regard to it.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING, AND MR. JUSTICE JELF.

SARAH ELIZABETH VISICK.

1909
16 *July*.
Sarah Elizabeth Visick.

Murder—Whether the judge in summing-up should refer to the improbability of a capital sentence being carried out depends on the way counsel for the defence deals with the question of punishment.

This was an application for leave to appeal against conviction. Appellant was convicted of the murder of her infant child, before Phillimore J., at the Assizes at Bodmin, on June 23rd, 1909, and sentenced to death. The sentence was subsequently commuted to one of penal servitude for life.

F. C. Jenkin for appellant (under sect. 10 of the Criminal Appeal Act), who was not present. Appellant fetched her child, six and a half weeks old, from the house where it was being nursed and went for a walk with it. Her story was that she had a faint, or fit, and on coming round found that the child was dead. She then threw it down a mine shaft. The medical evidence was to the effect that the child was not dead when it was thrown down the shaft, but died from the injuries then received; but in cross-examination the doctors said that it was possible the child might have died of suffocation, and been thrown down dead. In summing up to the jury the learned judge told the jury that bad as a conviction would be for appellant, it would not mean that she would be hanged, as for some time the Home Office had reprieved women in similar circumstances.

[DARLING J.: I suppose you had spoken of the possibility of capital punishment in your speech?]

Yes; but not in the way the learned judge indicates.

The learned judge also pointed out to the jury that the girl had had three illegitimate children, and said it might be considered

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whether it was not better for the public that she should be shut up. This was a matter foreign to the question the jury had to decide, and the learned judge's observation must have influenced their minds.

The Lord Chief Justice: Upon some of the observations made at the conclusion of the summing-up, to which counsel has referred, we express no opinion, but we must not be taken to endorse them. In some circumstances it may be proper to tell the jury that the death sentence will not be carried out. It depends on the way the case is conducted. I have tried cases in which counsel defending has exaggerated the consequences of an adverse verdict. Here appellant has already been reprieved, and the only question is whether there is ground for saying that the verdict is not one which a jury could reasonably have found, or that some injustice has been done. Apart from the matters referred to, the summing-up was very clear and careful. The question was whether the child died from the fall or was thrown down the shaft dead, after dying in its mother's arms. The medical evidence was that the organs were healthy, and that injuries to the head were the cause of death. Appellant had said to one witness, "I must own to it: I know I did it," and had also made a confession to a police constable. It is not going too far to say that the jury could not have found any other verdict.

Application refused.

JAMES WILLIAM GOAD.

James William Goad.

Degree of corroboration (not statutory) required of charge under 48 *&* 49 *Vict. c.* 69, *s.* 5 (*The Criminal Law Amendment Act*, 1885).

This was an appeal against an order of the Lord Chief Justice refusing leave to appeal against conviction and sentence, and bail, and an application for leave to call further evidence.

Appellant was convicted under sect. 5 of the Criminal Law Amendment Act, 1885, before Phillimore J., at the Salisbury Assizes, on June 7th, 1909, and on the 8th sentenced to fifteen months' imprisonment with hard labour.

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W. E. Lloyd for appellant, who was not present. Prosecutrix, a girl fifteen and a half years old, alleged that appellant had had intercourse with her in December, 1908, and on three subsequent occasions. She was with child, and conception must have taken place before Christmas, 1908. Appellant was on friendly terms with prosecutrix and her family. Her story of the alleged offences is uncorroborated. The learned judge misdirected the jury by implication, inasmuch as he told them that all that was required was that the girl's story should be consistent with the facts proved.

[DARLING J.: He says, "You will require something more than the girl's pure word. There is plenty of corroboration here if you believe it."]

There was no corroboration at all, except that witnesses spoke to having seen appellant and prosecutrix engaged in conversation, in the open highway, on various occasions other than the days on which offences were alleged, and early in the evening. The learned judge pointed out to the jury that the appellant was thirty-nine years of age, and asked what subjects of conversation they could have in common. He said: "Some people found them talking so eagerly that they did not notice them when they said good-night." The only evidence on that point was that of one witness whose greeting had, in fact, not been answered. The question the jury really tried was whether the prisoner was the father of the prosecutrix's child. It was suggested by the defence that prosecutrix had been intimate with a young man. Prosecutrix and the young man both denied that they had seen each other more than once. The defence called some evidence at the trial to rebut this, and leave is now asked to call additional evidence on this point. On the last occasion when intercourse was said to have occurred between appellant and prosecutrix, appellant swore that he was in fact in a room in his own house where his children, one being a girl of twelve, were being bathed. Phillimore J. said: "He would not stay in the room while the children had their baths." Appellant's wife was called and corroborated his statement, saying that he sat by the fire reading a paper.

[DARLING J.: Till quite lately the law did not allow a wife to

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give evidence against her husband, because it was assumed she would not tell the truth. You have to weigh the evidence of the prisoner, remembering he is prejudiced in his own favour.]

The prosecutrix is also prejudiced.

[The LORD CHIEF JUSTICE: There was evidence the jury might take as some corroboration. The evidence of interviews between appellant and prosecutrix on other days is *some* corroboration.]

It is very slight.

[The LORD CHIEF JUSTICE: There was evidence that when arrested appellant said: "Nobody has ever seen me with her."]

I suggest "with her" meant "having connection with her." Appellant denied this, and said his words were, "I've never been with the girl."

DARLING J.: This case was fully considered by all the judges before coming into Court. Mr. Lloyd has very properly and forcibly brought the points in favour of the applicant to our notice, but leave cannot be given. It was eminently a case for a jury. There was corroboration of the girl's story, though not a great deal, but in such a case it is hardly ever possible to get eye-witnesses. There may have been discrepancies, but they were not grave, and there are almost always discrepancies. They were all pointed out to the jury, who found the man guilty. We cannot say they did not come to that conclusion reasonably. As to most of the additional evidence, it is not admissible. Because the judge at the trial allowed the defence very great latitude, we are not to say that that latitude should be extended. Leave to appeal against sentence is also refused. The sentence is to run from last Friday (the earliest day this application could have been heard).

Application refused.

Solicitor for the appellant: *Bertram Spackman, Calne.*

CECIL DENCH.

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If a plea of insanity is set up after the trial, the Court will not interfere unless appellant would obtain some benefit from the exercise of its powers under sect. 5 (4) of the Criminal Appeal Act.

This was an appeal from an order of the Lord Chief Justice, refusing leave to appeal against conviction.

Appellant was convicted of (1) feloniously shooting at one Turner with intent to do grievous bodily harm, (2) unlawfully wounding one Leonard Bishop, before Mr. Justice Phillimore at Bodmin Assizes, on June 24th, 1909, and sentenced to six years' penal servitude on the first indictment and six days' imprisonment on the second, the sentences to run concurrently.

F. C. Jenkin for appellant (under sect. 10 of the Criminal Appeal Act), who was not present. The notice of appeal was drawn without legal assistance. I now ask the Court to quash the sentence, but to order that appellant be kept in custody as a criminal lunatic under sect. 5 (4) of the Criminal Appeal Act. At the trial it was proposed to call the clerk of the Asylums Committee to produce the certificate of appellant's admission to an asylum twelve years ago, but the learned judge ruled it was not evidence.

[Darling J.: It had already been given in evidence that appellant had been in an asylum and had come out again.]

Yes, but I wished to have certain details concerning his previous admission.

[The Lord Chief Justice: My experience is that if a man is in this condition he is admirably dealt with in penal servitude.]

Darling J.: Appellant was convicted of shooting with intent to wound and to do grievous bodily harm. He had been in an asylum and been discharged. He was always—not mad, but deficient in intellect. If insane, he would be sent to a criminal lunatic asylum. He will be carefully watched in prison, and there is no ground for giving leave to appeal to reach a conclusion which will be naturally reached if the man is insane.

Application refused.

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James George.

JAMES GEORGE.

Where a primâ facie *case for further inquiry, not set up before the single judge, is made out to the Court, it will grant leave to appeal.*

This was an appeal from an order of the Lord Chief Justice, refusing leave to appeal against conviction, legal aid and bail.

Appellant was convicted of an attempt to commit rape (on an indictment for the full offence), before Mr. Commissioner Avory, K.C., at Guildford Assizes, on June 29th, 1909, found guilty of an attempt to commit rape, and sentenced to fifteen months' imprisonment with hard labour.

Rowsell for appellant (under sect. 10 of the Criminal Appeal Act), who was present. Appellant was not represented by counsel at the trial. He is a man of 73 years of age, and the prosecutrix is his own daughter, aged 22. Appellant's previous character is good. It is almost certain that if appellant had set up the defence of consent he would have been acquitted. However, the defence has throughout been that the whole story was a fabrication.

There was bad blood between appellant and the rest of his family. He had been separated from his wife for four years. The daughters were living with their mother. Prosecutrix had on three occasions been sent by her mother to get money from appellant, and on one occasion had admittedly taken coins from his mantelpiece in his absence. Some of these coins she took back on April 25th, the occasion when the rape was alleged, and she was on the same occasion the bearer of a provocative message from appellant's stepson. The discussion which ensued and a struggle for the coins would account for the girl's crying out. The girl says she was in the room one hour, but Mrs. Edgeley puts it at two hours. It was a physical impossibility for connection to have taken place as prosecutrix said it did, on a box in the corner of the room.

[The Lord Chief Justice: That may be the reason why the jury found him guilty of an attempt.]

If they disbelieved the girl's story at all, they should have disbelieved it *in toto*, and acquitted appellant.

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A little girl, five years old, was in the room at the time, and was not tendered as a witness.

[Jelf J.: I have often refused to allow a child of five to be put into the box.]

The door of the room was open all the time, and Mrs. Edgeley, a witness, lived just opposite on the same floor (the first). She and her son, who was downstairs, were the only independent witnesses.

[Jelf J.: Prosecutrix tells a very long story. It is the most fearful concoction you can imagine, if it is not true.]

Her story is improbable. She says appellant said, "I am going to take liberties with you." The evidence as to the blood found on her clothes is inconsistent with her story.

[The Lord Chief Justice: I have read it, and it is certainly not in favour of the prosecution. She says she had changed her clothes after "she was unwell," before the alleged offence. The doctor says their condition on April 27th shewed they had not been changed recently.]

The evidence of prosecutrix at the trial differed from that she gave at the police court. There is no corroboration of her story.

[Jelf J.: A speedy complaint is part of the *res gestae*, and so is her crying out.

The Lord Chief Justice: On the depositions the girl says the child of five asked her what her father was doing. That is a possible reason why the child might have been called.]

The learned Commissioner implied that it was upon the appellant to give an explanation of why the prosecutrix had screamed, but, it is submitted, it is not upon him. Mrs. Edgley stated that she had heard screams.

The Lord Chief Justice: Without expressing the slightest opinion as to what the result of the appeal will be, the Court gives leave to appeal. The prisoner was not defended by counsel. I regret that the practice of asking some member of the Bar to undertake the defence was not adopted. On appeal we shall have

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the advantage of the presence of counsel for the Crown who was present at the trial. With regard to cases like this coming before the Court from the single judge, I desire to say that I was the judge who refused leave, because the case was clearly one for a jury, and there was no *primâ facie* case of misdirection, but, after hearing counsel, we think further discussion is desirable. These applications are nominally, but not really, appeals in the ordinary sense of the word. The cases in which leave is asked are to a large extent without the slightest grounds. But where they go before the judge and there is the slightest doubt they are referred to the full Court for further discussion. In this instance, I, delivering the judgment of the Court, concur in and am a party to that judgment, though I express no opinion as to the result. There is no ground for allowing bail. We will allow solicitor and counsel. As to two witnesses who ought to have been called by the Crown to prove threats against appellant, if the solicitor finds it necessary on substantial grounds to call fresh evidence, he may make a further application. At present we do not give leave as to the little child.

Leave to appeal and to call fresh evidence granted.

Thomas Robson Thornton.

THOMAS ROBSON THORNTON.

On an application for leave to appeal against conviction, leave to appeal against sentence may be granted.

No sentence, in view of a previous conviction, ought to be imposed by "rule of thumb."

This was an appeal against an order of the Lord Chief Justice refusing leave to appeal against conviction, and an application for leave to call further evidence.

Appellant was convicted of the larceny of a coat, and for receiving the coat well knowing it to be stolen, before the Chairman of the West Riding Quarter Sessions at Bradford, on 24th June, 1909. The jury returned a general verdict of "guilty," and appellant was sentenced to three years' penal servitude.

Jardine for appellant (under sect. 10 of the Criminal Appeal Act), who was not present. On the 23rd March, 1909, appellant, who is a betting man, was with several others at a club at Shipley

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for members of the Baptist congregation. He left the club with, among others, a man called Bartle, who had missed his overcoat, and spoken of his loss to appellant and the others with him. At that time appellant had no overcoat. Subsequently appellant was found wearing the coat, and said he had bought it for 2*s.* 6*d.* in the market-place. Appellant asks leave to call further evidence. In cross-examination at the trial, appellant, asked why he had not called the man from whom he said he had bought the coat, replied, "My counsel says it is not necessary. I take my advice from the chap who has undertaken my defence." Although there was no evidence at all of stealing, the jury returned a general verdict.

[Jelf J.: Possession of goods recently stolen, in the absence of a reasonable account, may be treated as evidence of stealing *or* receiving.]

Appellant also asks leave to appeal against sentence. There was another charge against appellant, and I asked that a sentence might be given which would leave him with a clean sheet. His last sentence was one of eighteen months' imprisonment with hard labour, and at these Sessions sentence, in such a case, is always given by rule of thumb, the last previous sentence being habitually doubled.

[The Lord Chief Justice: He has not appealed against sentence.]

He speaks in his application of this "preposterous sentence."

The Lord Chief Justice: So far as the appeal against conviction is concerned, there is no ground at all for interfering. The question of sentence was not before me when I refused the application for leave to appeal, but it is sufficiently raised to allow us to give leave. We shall then hear the facts of the other pending offences. If it is the fact that the Chairman acted upon some fixed rule as to doubling previous sentences, the matter requires consideration.

Leave to appeal against sentence granted.

MARK SHAWCROSS.

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Mark Shawcross.

Weak circumstantial evidence may be strongly corroborated by a confession.

This was an application for leave to appeal against conviction.

Appellant was convicted of murder, before Hamilton J., at the Manchester Assizes, on July 6th, 1909, and sentenced to death.

Bigham for appellant (under sect. 10 of the Criminal Appeal Act), who was not present. The evidence against appellant was of two kinds—(1) circumstantial evidence, which only shewed that he might have committed the crime; (2) two alleged confessions after the event. If I dispose of the confessions the whole case fails.

[The Lord Chief Justice: You cannot take the two classes of evidence separately.]

It will be dangerous to convict on this weak circumstantial evidence if the confessions were untrustworthy.

Appellant was convicted of the murder of a woman with whom he had lived at intervals for a long time. He was last seen with her at 8 o'clock on the night of the murder, and her body was found at 5.30 the next morning. Meanwhile appellant had started off on a long tramp in search of work. His sister was called as a witness to support his statement that he had previously planned this journey, and was in the habit of tramping by night. According to his story he first knew of the murder when he saw the Manchester newspapers in the public library at Todmorden. He then wrote the first of the confessions, and sent it to the sergeant of police at Gorton. In this confession, it was submitted, appellant, whose mind was temporarily off its balance from distress, reconstructed the crime from the newspapers, and reconstructed it wrongly. He stated, for instance, that the piece of linen found near the body came from the murdered woman's body. In fact a piece of linen had been found near the spot, but the police thought it was unconnected with the crime. The Manchester papers, however, said that a piece of blood-stained linen had been found. Counsel submitted that the account appellant had given of how he committed the crime was inconsistent with the medical evidence. In another letter to a man named Horfield, against whom it was proved he had no grudge, appellant had warned Horfield that his time was short, saying that he might as well be hanged for two as

for one; and in a third, to the police, he had said, "It will only be one life for two," stating that he had already killed a nigger in South Africa. 16 *July.* Mark Shawcross.

[The Lord Chief Justice: Can you get rid of these confessions when you have the coincidence of their being together on the night before the murder, with no explanation?]

I submit so.

There was evidence of friendly relations between appellant and deceased. A purse containing a small sum of money had been taken from her. It was preposterous that a man who had lived with her should have killed her for a small sum of money.

The Lord Chief Justice: Mr. Bigham has put before us all that can be said. I agree that, grave as the suspicion might have been, the circumstantial evidence here would not be enough by itself. But we must look at the case as a whole. If the evidence at the trial permitted the suggestion of some other person having assaulted this woman, the weight of the case against appellant would have been very small. But appellant and deceased were seen together on the night of the murder. The body was found in a lonely place next morning, and prisoner had gone off. The suggestion of suicide obviously cannot be sustained.

An account of the murder having appeared in some newspapers, appellant wrote a confession. We are asked to disregard it as the vapourings of an innocent mind due to the extraordinary circumstances. One would have thought that appellant would have hurried back. After referring to the other confessions, the Lord Chief Justice continued:—When charged prisoner said, "That is right." Sometimes those words amount to nothing, but here there are other statements to be considered. For instance, he said to his sister, "Of course I have done it." There is no ground for interfering with the verdict.

Bigham: Other grounds were put forward by prisoner, with which I have not dealt.

The Lord Chief Justice: I have read them. They would not have assisted him.

Application refused.

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HERBERT HOPKINS.

A fraud punishable only at common law cannot be punished by a term of hard labour (a).

This was an appeal against sentence by leave of the Lord Chief Justice.

Appellant, who was present, was convicted of a common law fraud, viz., attempting to obtain money by false pretences, before the Chairman of the Salford Hundred Quarter Sessions, on 28th June, 1909, and sentenced to eighteen months' imprisonment with hard labour.

A. Spencer Hogg, for the Crown, said, in reply to the Lord Chief Justice, that he could not justify the sentence of hard labour for a common law fraud.

The Lord Chief Justice: The sentence must be corrected to eighteen months' imprisonment without hard labour. There is no objection to the length of the term.

Sentence amended.

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ALFRED SOLOMONS.

Who is a "servant" within sect. 1 of 38 & 39 Vict. c. 25 (Falsification of Accounts Act, 1875) depends on the contract in each case—Payment by percentage of gross takings is no bar to the relation of master and servant: Hartley (*R. & R.* 139; 1807) *followed.*

Fares received under such a contract as to remuneration are not received to the employee's own use, but to that of his employers as well as of his own, and, therefore, such money fraudulently converted to his own use brings him within sect. 1 (1) of 1 Edw. 7, c. 10 (the Larceny Act, 1901).

The word "account" in that section is not limited by any other words in the section, but may include any contrivance registering words or figures.

The figures on an automatic taximeter may be an "account" within that section.

This was an appeal against conviction on the certificate of the trial judge, and an application for leave to appeal against convic-

(a) See *Hamilton*, (1901) 1 K. B. 740; 70 L. J. K. B. 480; 65 J. P. 265; 19 Cox C. C. 675; C. C. R.

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tion on questions of fact, but the appeal was based entirely upon questions of law. Appellant was tried at the Central Criminal Court on the 23rd, 24th and 25th June, before the Common Serjeant and a jury, upon an indictment consisting of fourteen counts, the first ten of which charged offences under the Falsification of Accounts Act, 1875 (38 & 39 Vict. c. 24), and the remainder under the Larceny Act, 1901 (1 Edw. 7, c. 10).

The first count charged him with having, on the 31st March, 1909, being a servant of the General Motor Cab Co., Ltd., unlawfully made a false entry in a certain account, to wit, a taximeter attached to a motor cab, by entering thereon figures, meaning that he, while driving the said motor cab for hire on behalf of his said employers, had earned fares amounting to a total sum of 1*l.* 5*s.* 4*d.*, and no more, on that date.

The third, fifth and seventh counts charged him with a similar offence on the 1st, 2nd and 3rd April.

The second, fourth, sixth and eighth counts charged him with making and concurring in making false entries "in another account, to wit, in a driver's sheet, on the 1st, 2nd, 3rd and 5th of April."

The ninth count charged him with having unlawfully omitted certain material particulars from a certain account, to wit, the said taximeter, by omitting therefrom the full and true amount of the fare due from one George Ross for the hire of the said motor cab.

The tenth count charged him with unlawfully falsifying a certain account, to wit, the said taximeter, by omitting to set and keep the flag of the taximeter in such a position that the taximeter fully and truly recorded the fare due from the said George Ross.

The eleventh, twelfth, thirteenth and fourteenth counts charged him with converting certain sums of money received for and on account of the General Motor Cab Co., Ltd., to his own use and benefit, on the 1st, 2nd, 3rd and 5th April.

Appellant was found guilty on all counts, and was sentenced to five months' imprisonment with hard labour.

George Elliott, K.C. (*Cecil Fitch* with him), for appellant, who was present. The appellant, a taxi-cab driver, drove a motor cab, the property of the prosecutors, the General Motor Cab Company. According to the usual practice of the company, appellant left the company's premises each morning with the cab allotted to him, after signing a document by the terms of which he acknowledged

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that he had received the cab in good condition and undertook to be responsible for any violation of police regulations. This document was called the "taximeter readings sheet," and the reading of the taximeter for the previous day and the amount then taken by the driver was entered upon it. Upon the driver's return to the garage each evening one of the company's officials, the "taximeter clerk," took the readings of the taximeter for the day, and the next morning these were entered upon the "driver's sheet" and the amount taken by the driver during his day's work was calculated. Of the amount taken by the driver 25 per cent. was retained by him and 75 per cent. paid to the company. After the clerk had worked out the account it was signed as correct by the driver. On the four days mentioned in the indictment appellant was observed to drive Mr. and Mrs. Ross from the Holborn Empire to the Crouch End Hippodrome. On each occasion he received nine shillings for the journey, and during the whole, or the greater part, of the journey the taximeter was not working, because he kept the flag attached to the instrument in such a position as to make the latter inoperative.

It was submitted, with regard to the first ten counts, that the relation of master and servant did not exist between appellant and the company. The various rules to which the company's drivers were obliged to conform were only precautionary, and such as proprietors of a garage might impose upon any persons using their premises or hiring their cars. Amongst other things, they laid down that cabs must be out by 11 a.m.; that drivers must keep their flags down while driving a passenger, under pain of instant dismissal; that drivers must not gamble. Any driver who absented himself for more than twenty-four hours without leave would be "immediately discharged." There were other provisions as to rest days. Drivers had to wear the uniform of the company. But all these are not rules of service, but conditions precedent of hiring. Once outside the garage the driver has no orders to obey at all.

[Darling J.: It is part of his service that he should go wherever he is wanted to go.]

As between the company and the driver the latter is not bound to take everybody. The relation is that of bailor and bailee.

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[Darling J.: The wearing of livery is some evidence of service.]

Not more so than the wearing of uniform by a volunteer.

[Darling J.: A volunteer is "in the service."]

Mere agreement to wear a uniform is not enough. There is here no attempt to direct what the driver shall do or how he shall do it. He receives no salary or fixed wages.

[Jelf J.: Are there not "servants" at restaurants who get no wages but pay to be there?]

The distinction is that they are obliged to do what they are told.

He referred to *Walker*, 27 L. J. N. S. M. C. 207; Dears. & B. 600; 4 Jur. N. S. 465; 6 W. R. 505; 8 Cox C. C. 1; C. C. R. (1858).

[The Lord Chief Justice: There the facts were that the prosecutors regarded the man as their debtor. Here the appellant is not a debtor. His duty was to pay in the money, although not the whole of it. Of the money your client kept for himself three-fourths belonged to the prosecutors.

Darling J.: Appellant had no right to any part of what he had taken till he had properly accounted for the whole.]

Till the account was made up the prosecutors would not know what was due. This shews that the relation of master and servant does not apply. Appellant was entitled to his share under the contract from the moment he earned it. In *Walker* (above), Wightman J. asked, "Was the prisoner bound to get orders?" Here there was nothing to compel appellant to take orders.

By sect. 23 of 6 & 7 Vict. c. 86 (the London Hackney and Stage Carriage Act, 1843), an agreement in writing, signed by the driver in the presence of a competent witness, is a condition precedent to the enforcement of payment of a sum claimed by the proprietor against the driver. The absence here of such an agree-

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ment is an effective bar to civil process, and also to a criminal prosecution, because it destroys what might have been the relation of master and servant.

[Jelf J.: It does not follow, because appellant could not be sued, that his offence could not be dealt with as a crime.]

King v. *Spurr* (1881), 8 Q. B. D. 104; 51 L. J. Q. B. 105; 45 L. T. 709; 30 W. R. 152; 46 J. P. 198 (*a*), shews that the fact that a cab is let to a driver does not create the relation of master and servant.

On this point counsel also referred to *Keen* v. *Henry*, (1894) 1 Q. B. 292; 63 L. J. Q. B. 211; 42 W. R. 214; 58 J. P. 262, C. A.; 69 L. T. 671; *King* v. *London Improved Cab Co.* (see *a*); *Bowers*, L. R. 1 C. C. R. 41; 35 L. J. M. C. 206; 12 Jur. N. S. 550; 14 L. T. 671; 14 W. R. 803; 10 Cox C. C. 250 (1866); and cited Regulation 42 of the Statutory Order of 30th December, 1907, under the Metropolitan Public Carriage Act, 1869, to shew that the Police Regulations were embodied in the rules made for drivers by the prosecuting company, and that these rules were therefore not evidence of service.

As to the last four counts, appellant did not receive the sums mentioned in the indictment "for or on account of" his masters, because he received them not in accordance with, but in disobedience of, their orders. See *Harris*, Dears. C. C. 344; 6 Cox C. C. 363; 23 L. J. M. C. 110; 2 C. L. R. 464; 18 Jur. 408; 2 W. R. 413 (1854); *Cullum*, L. R. 2 C. C. R. 28; 42 L. J. M. C. 64; 28 L. T. 571; 21 W. R. 687; 12 Cox C. C. 469 (1873); *Snowley*, 4 C. & P. 390 (1830).

As to counts 2, 4, 6 and 8, I rely on the absence of the relation of master and servant. As to counts 1, 3, 5, 7, 9, 10, I rely on the same argument, and I do not admit that a taximeter can come within the words of the statute.

[Jelf J.: I do not see why a pen should be needed to make a false account. Any machine may make it.]

(*a*) Overruled by *King* v. *London Improved Cab Co.*, 58 L. J. Q. B. 456; 61 L. T. N. S. 34; 23 Q. B. D. 281; 37 W. R. 737; 53 J. P. 788; C. A. (1889).

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Lastly, I submit that, upon the facts as proved, the evidence was not sufficient to justify a conviction. There was nothing to negative the suggestion that appellant might have run the car without a passenger till the taximeter had registered the equivalent of the sum he had received from Mr. Ross, and thus accounted to the company for all the money he had received.

Isaacs, K.C. (*Muir* and *Bigham* with him), was called upon only upon the question whether driving a passenger with the flag of the taximeter "up" was falsifying an account within the statute.

On one side of the taximeter there is a record indicating the number of miles actually run, and another those for payment. This record was untrue by reason of what appellant had done, viz., kept his flag up, whereby the number of paying miles, and, therefore, the sums payable for them were falsified. There is nothing in the statute to shew that an account must be on paper. The paper drawn up by the clerk at the office was copied from the machine, and both paper and machine are accounts, as much as a ledger or day-book.

The Lord Chief Justice: We have been much assisted by the very able argument for the appellant, but we feel no doubt about the case. A great deal of learned argument has been directed to shew that appellant was not a servant. There is no written document of hiring or service. A man gives in his name, is allotted a cab, and signs a paper accepting responsibility. A column of the sheet is filled in with "yesterday's" readings. Next morning another official reads from the taximeter the readings for "to-day." They are given to a clerk, who enters into "to day's" column the new figures. The total receipts are added up, and the balance due to the driver and to the company respectively accounted for. The driver certifies the figures as correct.

Other conditions depend upon a large number of notices, providing (*inter alia*) that a driver will be discharged if he stays away too long, "will be stopped two days" if he has not taken his car out by 11 a.m., will be suspended for two weeks if he does not wear his uniform, and will be instantly dismissed if he drives a passenger without lowering the flag. It is said that a man who takes a cab in these circumstances, paying nothing for the hire of the cab, is not a servant. He is not, in our view, in the same position as a man who hires a chattel and has to make no return of his method of using it. In *Callum*

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and *Harris*, cited in favour of the appellant, the circumstances were different, because the prisoners were not acting as servants when they did the acts complained of. It is only necessary for us to refer to a case decided in 1807, *Hartley*, R. & R. 139, the principle of which has been accepted in later cases. The headnote is: "Where the owner of a colliery employed the prisoner as captain of one of his barges to carry out and sell coal and paid him for his labour by allowing him two-thirds of the price for which he sold the coals, after deducting the price charged at the colliery. *Held*, that the prisoner was a servant within the meaning of 39 Geo. 3, c. 85, and having embezzled the price he was guilty of larceny within the words of that Act."

Mr. Elliott did not seriously deny that the sheet was an account and was falsified. It was not disputed that the taximeter figures were incorrect. Though not an actual record the taximeter was, as Mr. Isaacs said, an indirect record in that it shewed the number of miles run for payment. It is not disputed that the record was less than it ought to have been. We felt some doubt as to whether the falsification of a mechanical instrument was within the statute. The instrument was what the master had to go by, and we are of opinion that counts 1, 3, 5 and 7, which charged appellant with falsifying the taximeter itself, are good.

Upon the conversion counts, Mr. Elliott gave the only possible answer. It is true that a driver can go where he likes, but he pays nothing for the cab, and gets no money except by the use of the cab. He says, "I will make a true return, and hand over 75 per cent., 25 per cent. being my remuneration." It is not like the case of the old cabdriver, who paid so much down for the use of his cab, and had not to account at all. Whatever effect the Hackney Carriage Act may have on the right to sue, it clearly has nothing to do with an offence which may be committed under other statutes. In substance and in law appellant receives 15*s*. out of every 20*s*. for his master; the document he signs sets out the proportion. The appellant did receive money on account of the company, and it is not disputed that he kept more than 5*s*. of 20*s*. The appeal must be dismissed, the sentence to run from the date of conviction.

Appeal dismissed; sentence to run from date of conviction.

Solicitors—For Appellant, *Henry Danger*.
For Respondents, *Steadman, Van Praagh* and *Gaylor*.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE WALTON AND MR. JUSTICE A. T. LAWRENCE.

JOSEPH PHILLIPS, PHILLIP PHILLIPS, DAVID PHILLIPS.

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"False trade description" within sects. 1, 2, 3 *of* 50 *&* 51 *Vict. c.* 28 (*the Merchandise Marks Act*, 1887).

The onus is on the defendant to shew that "otherwise he had acted innocently" within sect. 2 (2) (c) *of that Act.*

Whether the "get-up" of an article sold amounts to a "false trade description" is a question for the jury.

These were appeals against convictions on grounds of law, and applications for leave to appeal against convictions on grounds of fact.

The appellants were indicted before the Chairman at the County of London Sessions on the 31st of March for unlawfully having in their possession and for selling boxes of cigars to which a false trade description was applied.

They were found guilty, but sentence was postponed till after the hearing of the appeal, on the failure of which it was to be a fine of ten guineas (in all). Meanwhile appellants were ordered to pay the taxed costs of the respondents.

Eldon Banks, K.C. (with him *Herman Cohen* and *Ricardo*), for the appellants. The indictment, which was framed under sect. 2, sub-sect. 2 of 50 & 51 Vict. c. 28 (the Merchandise Marks Act, 1887) [see Darling J.'s judgment, below], contained twelve counts variously charging appellants, who were partners, with selling and having in their possession for sale four different boxes of cigars, called "Bella de Cuba" cigars, to which a false trade description was applied. The prosecution was at the instance of the Havana Cigar Protection Association, a combination interested in the Havana cigar business. The alleged representation, which consisted of a combination of words, marks and figures, was to the effect that the cigars were Cuba and Havana cigars, whereas in fact they were British made. The point of law was that there was misdirection

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as to counts 1—9, in respect of which the learned Chairman ought to have ruled that there was no evidence to go to the jury; as to counts 10—12 the appeal was on the ground that the verdict was against the weight of evidence. Practically the difference between these two classes of counts was that the first nine referred to two of the boxes which had impressed or printed on a label both inside and outside of the lid "Guaranteed British Made" (or "Make") so conspicuously that no one could be deceived, and the remaining counts to the two other boxes, on which these words appeared not so frequently or conspicuously, but with sufficient clearness. There were two main grounds of appeal:—(1) There was no evidence, he submitted, of any false description either to the effect that the cigars were made in Havana or Cuba or that they were made of Havana tobacco. (2) But even if he was wrong as to (1) the appellants came within the protection of sect. 2, sub-sect. 2 (*c*) of the Act, inasmuch as they had "otherwise acted innocently." Counsel cited the judgment of Mr. Justice Channell in *Christie, Manson and Woods* v. *Cooper*, (1900) 2 Q. B. 522; 69 L. J. Q. B. 708; 83 L. T. 54; 64 J. P. 692; 16 T. L. R. 442 [quoted in Darling J.'s judgment below]. The appellants had carried on business as manufacturers of British cigars for very many years. In 1898 their attention was called to certain prosecutions as to boxes on which there were Spanish words but no mark of British make. They thereupon gave instructions to their workpeople that no box of cigars should leave their premises without first having been stamped and labelled, to shew that these cigars were British made. At the Franco-British Exhibition in 1908, which was an exhibition for French and British-made goods *only*, the appellants obtained the Grand Prix, which they recorded by putting a label upon all their boxes of cigars advertising the fact, *plus* the words "Guaranteed British Make." In accordance with the instructions given by the appellants, the boxes of cigars which they manufactured had, generally, stamped on them with a rubber stamp, both inside and out, the words "Guaranteed British Make." In some instances the boxes were so marked twice outside and twice inside. Owing to an oversight two of the boxes were sent out without the stamps, but each had a label consisting of the Union Jack with the words "Guaranteed British Make" pasted on the inside of the lid. As to the other two, on which the instructions had been fully carried out, it was submitted that so

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much of the indictment as referred to them must fail. It was impossible to draw the conclusion from the combinations of words and figures that it was indicated that the cigars were made in Cuba. Box No. 1, in fact, had "British Make" in four places, *i.e.*, four distinct statements that the cigars did not come from Havana. Box No. 2 had the same marks outside, but not inside. On one box the stamp had been smeared or rubbed off. Of course, if there was any statement anywhere that the cigars were made in Havana, that would be enough; but that was not even suggested here. One of the chief witnesses for the prosecution said the "get-up" of the boxes was similar to that usual for Havana cigars, but in cross-examination he had to admit that that "get-up" had been common for years to English, Dutch, Havana or any class of cigars.

[DARLING J.: But the young lady in the picture is everywhere called "Bella de Cuba."]

Yes; but another witness had to admit that he had never known Havana cigars advertised thus without the word "Havana." "Cuba" alone was never used; it was always "Havana, Cuba," or "Cuba, Havana." Appellants had in fact bought the picture "Bella de Cuba" and registered it as a trade mark. They had bought it in 1884 from dealers in such designs from whom all cigar manufacturers bought.

The charge against the appellants was that the combination of words and figures upon the boxes indicated that the cigars were made in Cuba, but by reason of these stamps and labels there was a definite statement that they were not. In this case, owing to the neglect of the order given, two boxes of cigars were sold without the stamp being upon them. At the trial the details of the "get-up" of the boxes had been minutely considered, and it had been shewn that the "get-up" consisted of labels, Spanish words and designs of ladies common to the cigar trade all over the world. As to the picture of the lady as the "Bella de Cuba," appellants had bought it and used the name before the Act. But these two boxes had the label mentioned. The cigars made were of excellent quality, and had been sold by appellants since 1884—before the Act—and were known and advertised as *Bella de Cuba* cigars; 95 per cent. of the material used in the making of the cigars was

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Havana tobacco, but for the outside wrapping Sumatra tobacco (the best of which cost £1 a pound) was used.

[DARLING J.: Then "*Bella de Cuba*" does not necessarily mean made in Cuba, or of Cuban tobacco?]

It means made of tobacco partly grown in Cuba. The advertisement [produced] put in by the prosecution indicated plainly that the cigars were British. How could it be said that there was any intention to infringe the Act? With the boxes was sent out an order form indicating that the cigars were English "Grand Prix" cigars. The catalogue, too [produced], contained illustrations of the London factory, and the covering letter with the catalogue referred to appellants as British tobacco manufacturers.

[In answer to the Court, *Avory, K.C.*, said that the cigars were bought on the advertisement alone; the catalogue was not seen till after the purchases.]

[WALTON J.: No doubt the most satisfactory correction of any possible misconception was the Union Jack, across which "British Make" was printed, but it did not occur in any of those boxes except on the inside. What appeared outside was the rubber stamp—not always very legible—and every one knew stamping was liable to be rubbed. As a "get-up" shewn to a jury might be thought by them a false trade description, why did appellants not make themselves absolutely safe by putting plainly on the box "These cigars are not Havana cigars"? Was it not for the jury to say what was sufficient?]

Yes; but we are charged with selling cigars with marks indicating that they are Havana cigars.

[WALTON J.: If the "get-up" did indicate that, and it was not sufficiently corrected—if the description with the words "*Bella de Cuba*" or others indicated Havana origin—and then they were stamped with the rubber stamp, might not a jury think that the false description, viz., the general "get-up," was not sufficiently corrected?]

Yes.

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[WALTON J.: Surely here the jury might first consider what the effect of the general "get-up" would be, and then go on to say that that was not sufficiently corrected by a blurrable rubber stamp.]

But there was no evidence here on which a jury could say that the "get-up" was likely to deceive. There was enough on every box to prevent a false trade description. If the intention was to deceive, why were the stamps put on the boxes at all? Surely not to infringe the Act. If what was put on the boxes was enough to indicate that the cigars were not Havana, there would be no offence. If it was not enough, the next question, he submitted, was, What was the intention? Here it was, plainly, to bring themselves within the protection of the Act by making it plain that they were not selling Havana cigars.

[DARLING J.: A stamp may be put on purely with the intention of not infringing the Act, but it may also be put on with the intention of partly complying with the Act, in the hope that it might be thought too risky to prosecute.

A. T. LAWRENCE J.: A man may intend to do the very mischief the statute aims at, viz., to deceive the purchaser, and then, to prevent that very thing—deception—puts something on the box. That does not get rid of an intention to infringe.]

Here a clear intention has been manifested to tell the buyer that he is not getting Havana cigars.

[A. T. LAWRENCE J.: Suppose that to be true as to the goods not coming from Havana, how does it meet the objection that all the tobacco used is not Havana?]

Only one witness suggested that there was anything on the box to indicate that the tobacco came from Havana. On this point, and generally, the judge at the trial summed up very strongly in appellants' favour. [Part of summing up read.] For the best of these cigars the appellants were able to get 70*s.* per hundred, a fact which was put against them as part of the case for the prosecution. The price of the cigars was not relevant—it could

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not deceive—because there was no representation with regard to it upon the boxes.

[A. T. Lawrence J.: Assuming that the description may deceive, the price may be evidence that it does deceive.]

The mere fact that Spanish words and signs were put upon the boxes did not shew that a false trade description had been applied, inasmuch as Spanish was the language of the tobacco trade all over the world. In *Butcher* (99 L. T. 622; 72 J. P. 454; 24 T. L. R. 797; 1 Cr. App. R. at p. 57; 1908), a case under the same sections as those here, Alverstone L.C.J. laid down the true test: "There was nothing in these boxes to indicate British or to negative Cuban origin." Here British origin was indicated and Cuban negatived on every box, and in some of them in several places.

Avory, *K.C.* (with him *Bodkin*) for the respondents, the Havana Cigar Protection Association, were not called on.

Darling J., in delivering the judgment of the Court, said that the appellants were indicted under sect. 2, sub-sect. 2, of the Merchandise Marks Act, 1887. By sect. 2 (1) of that Act, "Every person who . . . applies any false trade description to goods . . . shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, be guilty of an offence against this Act," and by sect. 2 (2), "Every person who sells or exposes for, or has in his possession for sale . . . any goods or things to which any . . . false trade description is applied, or to which any trade-mark or mark so nearly resembling a trade-mark as to be calculated to deceive is falsely applied, as the case may be, shall, unless he proves (a) That having taken all reasonable precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the . . . trade description, and (b) that on demand made by or on behalf of the prosecutor he gave all the information in his power with respect to the persons from whom he obtained such goods or things, or (c) that otherwise he had acted innocently, be guilty of an offence against this Act." In this case it was said that the appellants were not guilty, as they had "otherwise acted innocently." It might well be

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that that was a good defence, although reliance was not placed by the appellants on paragraphs (a) and (b) of this sub-section. Mr. Justice Channell said, in the case of *Christie, Manson and Woods* v. *Cooper* [above]:—"It seems to have been contended before the magistrate that the state of mind of the seller to the purchaser was material as regards a prosecution for this offence, and that in order to establish his innocence it was sufficient for him to shew that he did not intend to defraud the purchaser. That seems to me to have been a false point. The innocence contemplated by the Act is innocence of any intention to infringe the Act of Parliament, and that is the point which, I think, the magistrate ought to have considered. It seems to me quite clear that there may be innocence of any intention to infringe the Act, even although there may be suspicion of the genuineness of the article or trade-mark. That is what the word 'otherwise' means, as I think." Applying these observations of Mr. Justice Channell to this sub-section, it would seem to be a sufficient defence if "otherwise" the defendants had acted innocently. Then by sect. 3, sub-sect. (1) of the Act, "The expression 'trade description' means any description, statement, or other indication, direct or indirect . . . (b) as to the place or country in which any goods were made or produced, or . . . (d) as to the material of which any goods are composed, . . . and the use of any figure, word, or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, shall be deemed to be a trade description within the meaning of this Act.

The expression 'false trade description' means a trade description which is false in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, where that alteration makes the description false in a material respect, and the fact that a trade description is a trade-mark or part of a trade-mark shall not prevent such trade description being a false trade description within the meaning of this Act." I read these last words because it was contended here that this paper on these cigar boxes with the picture of the lady—"Bella de Cuba"—upon it was really a trade-mark which the appellants had registered in the year 1883, and that therefore they had acted innocently. But the last words of this definition shew that a trade description which is a trade-mark or part of a trade-mark may be a false trade description.

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Now, Mr. Bankes contended that there was no evidence here to prove either of the allegations, that the get up of these boxes was a false trade description as indicating either that the cigars had been made and produced in the island of Cuba and were Havana cigars, or that the material of which the cigars were composed was that of Havana tobacco. He has said that there was no evidence to go to the jury that the appellants had applied false trade descriptions to their cigars. The Court thinks that there was such evidence. For instance, if the box on which there was nothing about "Guaranteed British Make" was looked at, it was perfectly clear that there was evidence that a false trade description had been applied to the cigars in that box, viz., that the cigars were made in Havana of Havana tobacco. That being the state of things, when these boxes were turned out with the papers fixed upon them the boxes were stamped with the words "Guaranteed British Make." These words were not very large and not very distinct. These words were also stamped in the inside of the boxes. That was not very important, because in most cases these boxes would not be opened until they had been purchased. The question really was whether the appellants had intended to infringe the Act of Parliament. The Court cannot say that it might not be sufficient to stamp across these boxes the words "Guaranteed British Make"—across boxes stamped and got up in this way, and that it might not be perfectly plain that the cigars were not made or produced in Havana or composed of Havana tobacco. That might be so; it might well be that the boxes could be got up in this way with these words plainly put upon them; the cigars could be called "Bella de Cuba;" and still the trade description would be accurate; it might be perfectly plain to a buyer that it was not suggested that the cigars or the tobacco came from Havana. They might have such words placed upon them in such a way as would satisfy a jury, or even a judge, that there was no intention to contravene this Act of Parliament. But looking at all these things upon these boxes, the trade-mark or picture of the lady, "Bella de Cuba," the Spanish words "Colorado claro," "Flor fina," "Primera," "Calidad," "Bella de Cuba," the question is, was there any question to be left to the jury? We think that there was evidence to go to the jury that there was applied to these cigars a false trade description indicating that they were made and produced in Havana or Cuba and composed of

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Havana tobacco. There remained the other question: Did the appellants prove within the meaning of sect. 2 (2) of this Act "that otherwise" they "had acted innocently." That was emphatically a question for the jury. Defendants gave evidence that they had acted innocently, and stated that they had given orders that these words, "Guaranteed British Make," should be stamped upon the boxes. But the jury did not take that view. The jury were not bound to accept their evidence. This Court could set aside their verdict if they thought that the jury had acted quite unreasonably, or if it could be said that appellants had absolutely proved that they had no intention of infringing the Act. But we are unable to say that. We do not say that it would be impossible to use words which would make it absolutely unreasonable to find the proprietors guilty, but we are of opinion that these boxes being in the condition that had been described, we cannot say that there was no evidence that a false trade description had been applied to these cigars, nor that the jury had acted unreasonably in saying that the appellants had not proved to the satisfaction of the jury, within the meaning of sect. 2 (2), "that otherwise" they "had acted innocently."

Application and appeal dismissed.

Solicitors—For Appellants, *C. Urquhart Fisher & Co.*
For Respondents, *McKenna & Co.*

EDITH IRENE SIMMONDS.

Edith Irene Simmonds.

When it is material to prove an intent to defraud, evidence may be given of similar offences by the defendant.

This was an appeal from an order of the Lord Chief Justice refusing leave to appeal against conviction, and legal aid.

The appellant was indicted at the Hants Quarter Sessions, on June 29th, 1909, for obtaining goods by false pretences. She was found guilty on the only one of three indictments which was tried, and sentenced to twelve months' imprisonment with hard labour. A police superintendent gave evidence of an interview he had had with the appellant before she was in custody, and in the course of his evidence said: "I cautioned her, and told her that complaints

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had been received quite recently from London and the North of England that she had again obtained goods by false pretences, and further that a letter had been received from the Metropolitan police at Scotland Yard, asking that she might be requested to discontinue the use of" a certain name and address "as a reference without authority. She replied, 'It is difficult to live honestly when the police call at your house so often; I am a woman of the world. People give me credit until after they have made inquiries, and then it is called fraud.'" Appellant was undefended.

Kenneth Macmorran for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. This evidence is inadmissible, because it amounts to evidence of previous convictions. The use of the words "again obtained goods by false pretences" is improper, and should not have been allowed to be given in evidence before the jury. The answer to the question by appellant, although it is an admission, is irrelevant. In cases of this kind evidence of similar transactions may be given in order to establish guilty intent, but inasmuch as the evidence complained of in this instance goes to shew convictions, and not merely similar dealings on the part of the accused, such evidence needlessly embarrassed appellant, and should not have been admitted. The evidence of the use of a reference without authority is irrelevant, and is mere prejudice. He cited *Berriman*, 6 Cox C. C. 388 (1854).

Walton J.: The objection taken to the evidence admitted against the appellant on her trial amounts to an objection against other instances of the appellant obtaining goods by false pretences being made part of the present case against her. Speaking generally, evidence cannot be given against an accused person of the commission of other offences; but where the gist of the offence alleged is fraud, the question of intent becomes material, and it has been decided that evidence of other similar offences for the purposes of shewing intent is admissible. There is no ground for interfering in this case.

Application dismissed.

FRANK CRAWFORD.

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Where, after a long interval, there is a relapse into crime, all previous convictions may be taken into account in sentence.

This was an appeal against an order of the Lord Chief Justice refusing leave to appeal against conviction and sentence, and legal aid. The appellant was indicted before the Chairman at the West Riding Quarter Sessions, on June 29th, 1909, for obtaining 2*l.* by false pretences. He was found guilty and sentenced to three years' penal servitude.

Willoughby Jardine for appellant (under sect. 10 of the Criminal Appeal Act), who was not present. The charge against appellant was one of having obtained 2*l.* by means of a worthless cheque. It appeared that he had been in the habit of cashing cheques at the public-house of which the prosecutrix was the licensee. Appellant took a cheque written on a piece of paper for the purpose of cashing it in the usual way. The prosecutrix said that she did not like the appearance of the cheque, it being unlike those she had previously cashed. Appellant told her that if it did not go through, he would call and repay her the money in a day or two. The cheque turned out to be a forgery. Appellant did return as he promised and paid a little on account of what he had been lent, but was unable to refund the whole amount. The prosecutrix never relied upon the cheque, although she kept it in her possession. She accepted appellant's promise to return, which was in fact fulfilled. There was therefore no false pretence.

[Walton J.: In her evidence the prosecutrix said that she let appellant have the money in consequence of what he said about the cheque being good.]

Apart from the validity of the conviction, the sentence was excessive, being an automatic increase of sentences previously given (*a*). There were convictions and severe sentences for this offence against appellant—fourteen, twenty-two and twenty-three years ago. There were also convictions of a more recent date, viz., in 1901 and 1908, when appellant was sentenced to three months'

(*a*) See *Thornton*, p. 284 above, and p. 315 below.

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imprisonment. In this case the sentences in and before 1896 had been taken into consideration, and this should not have been done.

Lawrence, A. T.: We see no ground for allowing the appeal against conviction. There was ample evidence to go to the jury. The false pretence was that the cheque in question was a good cheque, whereas in fact it was admittedly a bad one. If the prosecutrix parted with the money relying upon what the appellant said about the cheque being a good one, it does not matter whether she relied upon his promise to come back or not. With regard to the sentence there is nothing to shew that it is a sentence passed according to a "rule of thumb," but on the contrary, having regard to the previous convictions, and the fact that appellant had in recent years again entered on a career of crime, is a right and proper one.

Applications dismissed.

Francis Reginald King.

FRANCIS REGINALD KING.

Mental eccentricity, short of insanity, cannot be taken into account in sentence.

This was an appeal from an order of the Lord Chief Justice refusing leave to appeal against sentence.

Appellant was indicted before the Recorder at the Central Criminal Court on June 26th, 1909, for forgery.

He was found guilty, and sentenced to seven years' penal servitude.

E. F. Lever for the appellant, who was not present. The appellant was in the employ of the London and South Western Bank, and was concerned with a man named Robert (who had been convicted with him) in what was known as the "D. S. Windell" case, by which the bank had been defrauded of £2,300. In sentencing the appellant to seven years' penal servitude, the Recorder had said that as the Recorder of the City of London, the greatest commercial city of the world, it was his duty to preserve the City's commercial integrity and to pass such a sentence as would not only punish appellant but would deter others. The ground of appeal was that the importance of the crime had been

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unduly emphasized, and the personality of appellant disregarded. The audacity and cleverness of the fraud weighed with the Recorder, and although it must be admitted that there had been a breach of trust on the part of appellant, it must be remembered that while he was handling large sums of money he was only in receipt of a salary of £150 per annum. Appellant, who had been in the employment of the bank sixteen years, was of an eccentric disposition. His father's brother and sister had died in an asylum, and his mother's brother and two sisters had died of brain complaints. Appellant himself was abnormal. He was a vegetarian, a dabbler in the occult sciences, and the champion of all "lost causes," *e.g.*, astrology and theosophy. These facts had not been brought to the mind of the Recorder.

Darling J.: Appellant appeals against his sentence of seven years' penal servitude. He was tried with a man named Robert who called himself "D. S. Windell," who, at the suggestion of appellant and in conspiracy with him, obtained large sums of money from the bank. Appellant, who was a man twenty-nine years of age, devised a most ingenious scheme, and, finding a tool in Robert, unfolded his plan to him. The Recorder carefully considered the distinction between the men. Robert was not in the employment of the bank, and therefore was not likely to have committed this fraud unless it had been suggested to him by someone familiar with the working methods of the bank. It is now suggested that appellant inherits brain-trouble, and that it is difficult to know whether he should be kept in a lunatic asylum or in prison. It is suggested that on account of this tendency appellant should receive different treatment from that which has been meted out to him. It has been complained that the Recorder referred to the case as a fraud which imperilled the safety of London finance. The sentence, however, was given to deter appellant and other persons from committing a like offence. Is there any reason why because the appellant has peculiarities he should not receive a proper sentence? Very likely it is true that, in his leisure, he had attended lectures on all sorts of out-of-the-way subjects which he had ill assimilated. But if he is on the verge of lunacy—and criminal lunacy—that is an extra reason for keeping him away from society. If he becomes a lunatic he will be properly dealt with and taken care of, and therefore we are

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unable to see why he should be treated otherwise than as a bank clerk who has seduced another person to commit a fraud and committed one himself.

Application dismissed.

Solicitors for the applicant: *Hutchinson, Sons & Gomm.*

Arthur Norman Lockhart.

ARTHUR NORMAN LOCKHART.

A slight overt act may be evidence of a conspiracy to defraud.

This was an appeal from an order of the Lord Chief Justice, refusing leave to appeal against conviction, and an application for leave to call further evidence.

The appellant was convicted before the Recorder at Andover Quarter Sessions, on the 30th of June, for conspiracy to obtain money by false pretences, and sentenced to six months' imprisonment with hard labour.

E. A. Jelf for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. The false pretence alleged was that the appellant, with another man named Bell, who was indicted with him, was agent for the Humber Cycle Company. The charge against them was making up their minds together to defraud. The two men went to Andover together and stayed at the same inn, and appellant went into one or two shops to get cycle catalogues. It appeared that this was the only part he took in the transactions, a fact which Bell substantiated out of Court. The appellant gave the catalogues to Bell, who visited a shop belonging to a Mr. Clark, and by means of the catalogues and other representations obtained the money in question. The appellant stayed outside the shop, and therefore took no part in what happened inside. He denied that he ever got the catalogues, but, supposing he did, it was impossible for him to know that Bell was going to use them afterwards for a felonious purpose. In the alternative, he asked leave to amend the ground of appeal against sentence, and called Bell as a witness. He referred to *Mulcahy* v. *R.*, L. R. 3 H. L. 306; Ir. R. 1 Ch. 12 (1868), where Willes J. cites Grove J. as saying that conspiracy is generally "matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them" (H. L. at p. 317).

WALTON J.: We think there was evidence upon which the jury could convict, and refuse leave to appeal against sentence.

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Arthur Norman Lockhart.

Application dismissed.

Solicitor for the applicant: *C. A. Brown.*

ARTHUR WOODBRIDGE (*a*).

Arthur Woodbridge.

The Court will review a conviction founded on mere suspicion.

This was an appeal from an order of the Lord Chief Justice refusing extension of time, leave to appeal against conviction, and legal aid, and an application for leave to call further evidence.

Appellant was indicted before the Deputy-Chairman at the Middlesex Sessions, on June 5th, for burglary in the house of a man whom he had known for some years.

He was found guilty and sentenced on July 3rd to twelve months' imprisonment with hard labour.

J. H. Watts for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. This was merely a case of suspicion. The prosecutor, his wife and father-in-law left home at about 6 o'clock with the intention of going to a music-hall. They called at a public-house, and the father-in-law said that when they were seated there he saw appellant put his head in the door and then disappear. The suggestion was that appellant having seen prosecutor away from home went and broke into his house. The fact that the house had been broken into was not discovered until 10 o'clock the next morning. A week afterwards the prosecutor's brother met appellant and told him that he was suspected, and asked him whether he would see the prosecutor. This appellant at once agreed to do, and even waited outside an eating-house while the brother had his dinner and then went quite willingly with him to the prosecutor's house. He admitted that he had been to the house that night, but went there to sell the prosecutor some sash-fastenings. Not finding him at home, he went away.

Leave to appeal granted.

(*a*) See p. 321, below.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING AND MR. JUSTICE A. T. LAWRENCE.

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REUBEN REEN AND JOHN LINTOTT.

Fresh evidence.

Co-prisoner, not a witness at the trial, giving evidence in this Court.

Solicitor for prisoners, authorised by one of them to give his confidential statement in evidence, called by the Court.

Both appellants, who were lads, had been jointly indicted, before Mr. Commissioner Avory, at Guildford Assizes, on 29th June, and convicted of setting fire to Onley Heath.

Reen, who had been sentenced to twelve months' imprisonment under the Borstal system, appealed from an order of the Lord Chief Justice refusing leave to appeal against sentence, and legal aid. Lintott appealed, by leave of the same learned judge, against conviction and sentence, and against the conviction on a point of law, and applied for leave to call further evidence. Both appellants were present.

Whiteley (for Lintott) explained that at the trial both appellants were to be defended by him, under the Poor Prisoners' Defence Act. He saw them both, and so had the solicitor. Reen made a statement about Lintott, but declined to go into the witness-box, on the ground that his father would not like him to take an oath, whereas Lintott at once agreed to do so (and did so). It happened, however, that both he and counsel for the Crown (who intended to offer no evidence against Lintott) returned their briefs, and when the trial came on these facts were not known to the Court nor to counsel in the case. He was now quite willing to take the responsibility of putting Reen into the box, but he had some doubt whether he could call appellants' solicitor, in view of sect. 9 of the Criminal Appeal Act:—"The Court of Criminal Appeal may, if they think it necessary or expedient in the interest of justice . . . . if they think fit receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not compellable witness . . . ."

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[The Lord Chief Justice: There ought to be further evidence as to Reen's statement about Lintott. The solicitor would be a competent witness for Lintott, though not against his own client, Reen.]

Whiteley: If Reen proved hostile I could put his statement to him. At the trial there was evidence that both appellants were seen letting off cartridges in a lane leading to the common, and that they were seen together after the fire. The only other evidence against Lintott was that he was afterwards heard to say to Reen, "I told you not to do it," but that, of course, was quite consistent with his innocence.

The Court having ascertained that Reen was now willing to give evidence, the latter was sworn, and examined by *Whiteley*. His testimony exculpated Lintott.

Cross-examined by *W. B. Campbell* for the Crown: I left Lintott on the common; he did not say to me, "Don't burn the common;" if he says he did, it is untrue. He never asked me to buy paraffin oil to fire the common. What I said about this was untrue. I told an untruth because I was afraid of the superintendent. I am telling the truth now, because I may be the better for it. Raggles, Lintott's half-brother, said at the trial that when I was at Lintott's house, and he was going to bed, after the fire, I said, "Don't tell, or you'll get into more trouble than I shall," but I don't remember this. After the fire, I overtook him on the road, but nothing was said about the fire. What Lintott says about this is untrue. When I did it [the fire], he was forty to fifty yards away. We had both let cartridges off in the lane leading to the common before the fire.

Darling J.: Why did you not give evidence at the trial?

I didn't wish to get anyone into trouble. Lintott did not say at his house, "I told you not to do it."

W. M. Maud, Solicitor, was called by order of the Court.

The Lord Chief Justice: I understand, Mr. Maud, you are quite willing to give evidence?

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Yes, I have seen Reen, and he has given me authority to state what passed between us at Wandsworth Gaol. I saw him there after the trial, and told him that Lintott was appealing, and asked him whether I might use his statement to me in the cells at Guildford the day before the trial, and he gave me a written authority to do so. On that occasion I fetched his father (when he objected to going into the box without the latter's permission), and in his presence I explained to the father what had happened, *i.e.*, his exoneration of Lintott. Then his father said to him, "You had better own up like a man," whereupon he said he would plead guilty, and his father left. Appellant was crying, and it is difficult to say what were the exact words he used, but he gave me the impression that Lintott had tried to persuade him not to put the candle in the furze. At the trial he refused to plead guilty.

Cross-examined by *Campbell:* My impression is that he said Lintott knew that he had put the candle down in the furze, but not that he had set fire to it.

In reply to the Court, witness said that he was prepared to hear Raggles's evidence from what Lintott had told him; not that Lintott had spoken to him of this conversation.

Whiteley: The evidence against Lintott was not in itself satisfactory. The evidence against him was that he was in company with Reen when the latter brought cigarettes, candle, and matches, and they were seen together both before and after the fire. Three witnesses for the prosecution saw Reen first and then Lintott; a fourth saw Lintott first and then Reen—only one saw them together. The only other evidence is that of Raggles, which is really not against Lintott at all, viz., that Lintott said to Reen, "I told you not to do it," and that he repeated this the following morning. Being with Reen is surely not evidence to go to the jury that Lintott is guilty of the fire. It is submitted that Lintott, in the box, added nothing to this evidence; but it is true that when he was cross-examined by the learned Commissioner he did lie.

[The Lord Chief Justice: Lintott's evidence is not quite consistent with Raggles's.]

The lies ought not to prejudice him.

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The LORD CHIEF JUSTICE: If this evidence of what Reen said in the cells—when he had no interest in telling a lie—had been before the Court, Lintott might have been acquitted. Reen's statements which came out, though the jury were told that they were not evidence against Lintott, still implicated him.

Campbell said that it was not his duty to resist the appeal, since the new evidence undoubtedly exonerated Lintott. Had it been before Mr. Commissioner Avory he would never have let the case for the Crown go to the jury; and, if he had, no jury would have convicted. He (counsel) agreed, on the depositions, that there was only a slight case against Lintott, but as Reen unexpectedly pleaded not guilty, he thought that it would be no harm for both cases to go before the jury. He had stated that if the Commissioner should propose that the Crown should not go on against Lintott he would willingly accept this suggestion. When, at the end of the case for the prosecution, it was submitted that there was no case, the learned Commissioner did not take this view. Lintott's story throughout had been that he disapproved of the fire, and the evidence of the Crown witnesses confirmed thi . After the fire Reen overtook him and told him of the fire, and Lintott said, "I told you not to," and this was confirmed by the evidence against him. The fact was that Lintott was a dull and stupid lad, and had really been convicted on the untruths he told in cross-examination. For instance, he said he had not been on the common at all, when he had told the police the opposite. Perhaps he did not understand these particular questions. If he had not gone into the box he must have been acquitted.

[The LORD CHIEF JUSTICE: The jury were cautioned as to Reen's statements implicating Lintott, but they were not bound to disregard them.]

The learned Commissioner had mainly commented on those false answers, but it was quite possible that the two most striking ones were due to a misapprehension. Of course, the case against Lintott was not now pressed.

The LORD CHIEF JUSTICE said that the prosecution had acted

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with great fairness, and maintained the best tradition of the duty of Crown counsel, to bring out everything in the prisoner's favour. He had given Lintott leave to appeal because there was a case to be argued. If at the trial the case against him had stood alone, the Crown would not have been justified in going on; but, as things stood, both boys being on their trial, the learned Commissioner would have had a difficulty in withdrawing the cases from the jury. In the light of the new evidence the case against Lintott could not be sustained. If it had been before the learned Commissioner, he probably would not have been convicted As to Reen, his conduct shewed that he was a youth without any regard for anything except his own interests; his appearance in the witness-box on the present occasion was not the outcome of generous instincts, but, as he himself confessed, dictated by self-interest. He had told many lies. There was no ground for interfering with his sentence, which, in his own interest, must be confirmed.

Conviction of Lintott quashed.
Application of Reen dismissed.

Solicitor for Appellants: *W. M. Maud*, Guildford.

Lewis Liebling.

LEWIS LIEBLING.

A document written by a witness at the hearing before a magistrate may be exhibited to his deposition and put in at the trial without calling him.

A constable may ask for an explanation as to property found on a person not yet charged without cautioning him.

Appeal against an order of the Lord Chief Justice refusing leave to appeal against conviction. An appeal on grounds involving questions of law was in the Summary List.

Appellant was convicted on 28th June at Nottingham Quarter Sessions of receiving certain stolen lace curtains. A detective named Atherton investigated the crime, obtained a number of lace curtains from different persons who had purchased them of appellant and which were alleged to have been stolen, and asked appellant to come to the police-station to see the curtains and give an explanation. At the station Atherton questioned appellant about the goods before charging him and without cautioning him, and appel-

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lant said that his son could produce a receipt from the vendors of the articles to him. The son in fact produced a receipt which was identified as being in his (the son's) handwriting. In the police-court proceedings the son gave evidence as a witness, and, being asked to do so, wrote down to dictation the words contained in the receipt upon a piece of paper then supplied to him. This piece of paper was then annexed to his deposition as an exhibit. At the trial it was proved by the clerk to the justices, without calling the son as a witness.

Moresby White, for the appellant, who was not present, raised two points; first, that the exhibit to the deposition was hearsay evidence, and could not be proved without calling the son as a witness, unless he were prevented from attending in such a way as to make the deposition itself admissible; second, that appellant ought to have been cautioned at the police-station before being asked for an explanation, and that in the absence of such caution his replies to questions then asked were inadmissible.

The Lord Chief Justice said that the first point was ingenious, but unsound, and that the second point was covered by the recent decision of this Court in the case of *Best*, 2 Criminal Appeal Reports, 30 (1909), where he (the learned judge) had said that a prisoner might be asked to give an explanation as to property found upon him, as it often gave him an opportunity of saying and shewing that it was his own.

Application and Appeal dismissed.

Solicitors for Appellant: *Allen & Anderson*, Nottingham.

THOMAS ROBSON THORNTON (*a*).

Thomas Robson Thornton.

After several sentences of imprisonment a sentence of penal servitude may be justified for an offence for which otherwise it would be too severe.

In this case the prisoner was sentenced to three years' penal servitude, at West Riding Quarter Sessions, for stealing a coat. There were several previous convictions, and on the last occasion

(*a*) See p. 284, above.

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appellant was sentenced to eighteen months' imprisonment with hard labour.

W. M. Jardine, for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present, said that the offence was unpremeditated, and that the remarks of the Chairman of Quarter Sessions shewed that the practice of that Court was to double automatically the sentence upon each previous conviction. To that extent he wished to qualify his remark on the previous hearing. The Chairman said: "The only alternative we have is three years."

[The Lord Chief Justice: That only means "We cannot give you imprisonment; therefore it must be penal servitude, and three years is the minimum." Some people think this is less severe than even eighteen months' hard labour.]

At appellant's request another charge of stealing a bicycle was considered by the Chairman and taken into account in the sentence. He (counsel) had taken a strong view of the practice of that Court, and if there had been a dozen charges against appellant he would have advised him to plead guilty, as it would make no difference to sentence there. He knew nothing about the other pending charge as to the bicycle, but he protested against "the only alternative" being three years' penal servitude because the last sentence was for eighteen months.

Geoffrey Ellis, for the Crown, was not called upon. He mentioned that the police had suggested to him several other pending charges, but he had only allowed them to refer to the one as to a bicycle, in which a warrant had been issued.

The Lord Chief Justice: This is not a case of arbitrary doubling a previous sentence, as was originally suggested by Mr. Jardine. There is not the slightest ground for the suggestion as to "a rule of thumb." Three years' penal servitude is not twice as heavy as eighteen months' hard labour. In view of the prisoner's record of ten previous convictions, the sentence was a perfectly proper one. There comes a time when the sentence of imprisonment with hard labour must cease, and a longer term and a different treatment must be tried. Sentence may run from the date of conviction.

Appeal dismissed.

EDWARD CARR.

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Edward Carr.

Misdirection—If the prosecution puts forward a witness as an accomplice (even in the alternative) there must be corroboration.

In this case appellant was convicted on July 1st, at North Riding Quarter Sessions, of receiving a stolen coat at Middlesbrough, and sentenced to three years' penal servitude. Leave to appeal had been granted by the Lord Chief Justice.

Coutts-Trotter for the appellant (under sect. 10 of the Criminal Appeal Act), who was present. A man named Chapman came on the night of April 11th into Richmond Street, Middlesbrough, wearing a coat stolen on March 20th. He asked one Holmes, who was with him, to buy it, but Holmes passed on the offer to one Jim Fry. The latter bought the coat for half-a-crown, and he gave it to Holmes, and Holmes handed it over to Carr, who was standing near. On these facts, which were proved chiefly by the evidence of Holmes, Carr was convicted of receiving the stolen coat. The suggestion obviously is that he was "the undisclosed principal" of Holmes. Now the prosecution is faced with a dilemma. Either Holmes knew the coat was stolen, in which case he is an accomplice, and appellant was convicted on the uncorroborated evidence of an accomplice, or else Holmes did not know the coat was stolen, in which case the Crown obviously cannot prove the guilty knowledge of Carr. In either case the learned Chairman had misdirected the jury, since he had not called their attention to either horn of the dilemma. It was true that appellant had set up a false *alibi*.

Horace Marshall for the Crown.

Darling J. said the Court assented to Mr. Trotter's proposition. There had been misdirection, or else an absence of evidence to go to the jury. It was not surprising that when his *alibi* broke down he was convicted—a result which people who advised this kind of defence should bear in mind. But he was not disentitled to have his conviction quashed because he had told a lie.

Conviction quashed.

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James George.

JAMES GEORGE (*a*).

Conviction quashed in a case of grave doubt.
In cases of difficulty counsel should be asked or instructed to defend a prisoner.

Rowsell for the appellant, who was present.

H. H. S. Croft for the Crown.

Henry Spice, of Merton, was called, and deposed that on the Monday following April 25th, the date of the alleged offence, David George, a son of the appellant, spoke to him while he was at work, and said: "We have got the old man; he has been and done it to the girl, and I am going to have him put away if I can. I am going to see into it now." He also said that he had been trying to get rid of his father for a long time. On the night before this conversation witness had seen the girl about 7 p.m. in a road at Wimbledon laughing and playing about with her sister-in-law as if nothing had happened, and he told this to David George, and said that he did not believe the story. He also told his wife the next day that there did not seem to be anything wrong with the girl.

The witness was not cross-examined.

Croft was unable to explain, in answer to the Court, why a sister of the prosecutrix, five years old, who was present in the room, was not sent for assistance. He pointed out that the way in which the prosecutrix gave her evidence impressed the jury very favourably, that the learned Commissioner summed up with absolute impartiality and there was a very patient hearing. He was informed that legal aid had been refused appellant when the trial began, because he had not asked for it when he pleaded on the previous day.

The Lord Chief Justice: We have had the greatest difficulty with this case, and we may be doing wrong. The case peculiarly illustrates the desirability of this Court having the power to order a new trial, a point to which we have often referred. We only quash the conviction because we feel that it is better that possibly guilty persons should escape than that one possibly innocent

(*a*) See p. 282 above.

person should be convicted. In a case of this kind some counsel of experience should have been instructed or asked by the Commissioner who tried the case to defend the prisoner. We are informed that this was not done because no available counsel was present in Court at the commencement of the trial.

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Conviction quashed.

Solicitor for the Appellant: *Cyril Renton.*

ALICE JAMES.

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Alice James.

Inducement to confess—The proper rule as to "induced" confessions is laid down in the cases of Thomas (7 *C. & P.* 345; 1836) *and* Reason (12 *Cox C. C.* 228; 1872).

A confession two hours after questions answered, after a proper caution by a detective-inspector, is admissible.

This was an application for leave to appeal against conviction, but, on the application of counsel, the notice of appeal (which had been drawn by appellant herself) was amended so as to permit a point of law being argued. The prisoner had been convicted on July 22nd before the Lord Chief Justice of the murder of her illegitimate child, seven months old, and sentenced to death, at the Central Criminal Court, but reprieved. A police-detective, who investigated the case, had seen appellant at the police-station, and had told her that inquiries were being made as to what had become of the child. She had told two contradictory stories as to its whereabouts, one being that it was being brought up in the country by respectable people, and the other that she had given it into the charge of a woman in Euston Road; the police wanted to find that woman and rescue the child from her hands. At the station the detective-inspector said to her: "You are detained here while we are trying to find your baby. You must tell me all about the woman who, you say, has your baby. I shall take down any statement you make, and if any harm has come to the baby at your hands you will be charged, and any statement will be given in evidence

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against you at your trial." She then answered questions, and two hours afterwards, without any further statement by the inspector, she confessed that she had murdered the child and completely burnt its body.

J. D. Cassels, for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present, argued that the above-quoted words amounted to such an inducement as made the confession inadmissible. All the circumstances of the case—her detention at the police-station and the absence of a warning by the detective that she was not obliged to say anything at all, or that she need not incriminate herself—shewed that the confession, although made two hours after the words complained of, was really the result of fear induced in the mind of the prisoner by the statement of the inspector, a person in authority.

He quoted the following cases:—*Thompson*, (1893) 2 Q. B. at 15; 62 L. J. M. C. 93; 69 L. T. 22; 41 W. R. 525; 17 Cox C. C. 641; 57 J. P. 312; C. C. R., *per* Cave J.; *Knight and Thayre* (1905), 20 Cox C. C. 711; 21 T. L. R. 310; 69 J. P. 108, *per* Channell J.; *Baldry*, 2 Den. C. C. 430, *per* Pollock, C.B., at 441; 21 L. J. M. C. 130; 10 Jur. 599; 5 Cox C. C. 523 (1852); *Berriman*, 6 Cox C. C. 388 (1854), *per* Erle J.

[The Lord Chief Justice: If a man has made up his mind to charge he ought to caution at once.]

No counsel appeared for the Crown.

Mr. Justice Darling said that the above facts did not amount to an "inducement" to confess, in the technical sense of that word. His Lordship cited with approval the judgment of Coleridge, J. in *Thomas*, 7 C. & P. 345 (1836), and the case of *Reason*, 12 Cox C. C. 228 (1872).

Appeal dismissed.

ARTHUR WOODBRIDGE (*a*).

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Arthur Woodbridge.

Where the facts are all consistent with guilt, and some inconsistent with innocence, the Court will not interfere with the verdict.

Watts, for the appellant, who was present. The case against appellant was merely one of suspicion; there was no direct evidence against him. It consisted of the following grounds of suspicion, each of which was capable of being explained away. First, appellant had been present at a public-house shortly before the offence must have taken place, had there seen the prosecutor, whom he knew, and might have learned from him that he had left his house locked up and with no one to look after it. Secondly, appellant admitted that he had called at the house that evening, but gave an explanation of his doing so. Thirdly, there was no clear evidence as to when the jewellery was taken; two neighbours said, one that she heard a dog bark about 8 p.m. that evening, the other that she saw a light in the prosecutor's premises about the same hour; such evidence could not create any ground of inference as to when the crime occurred. Fourthly, it was alleged that appellant had evaded arrest when told that he was suspected, had gone away leaving a false address, and had run away when next seen by the prosecutor's brother in the street. These incidents were exaggerated, and depended on the evidence of a person whose mind was inflamed with suspicion of appellant's guilt. The case ought to have been withdrawn from the jury. See *Farr Leach*, 2 Cr. App. R. 72 (1909).

Purcell, for the Crown: Appellant's story as to his movements was largely false and wholly improbable. The facts were all consistent with his guilt, and at least one of them, if not more, was inconsistent with innocence, viz., when on May 14th the prosecutor saw him walking on the road and turned, he ran away.

That was the test adopted by this Court in deciding whether or not to uphold a conviction on the ground that it was supportable by the evidence. Twenty pounds' worth of the jewellery had not been traced. The date of the burglary is fixed by the fact that prosecutor's wife missed the things next day, and then the marks

(*a*) See p. 309, above.

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on the door were noticed. A neighbour saw a light in the house at 8.30 p.m. the night before.

Watts, in reply.

The Lord Chief Justice: This case would have been a case of mere suspicion but for the appellant's own conduct after the alleged crime. He had told a manifestly false story to account for his visit to the prosecutor's house on the night of the crime; his movements after he learned that he was suspected were those of a guilty and not those of an innocent man; his explanations of his conduct on the various occasions of suspicion were too improbable to be credible. There is no ground for interfering with the verdict of the jury.

Appeal dismissed.

Solicitor for Appellant: *A. Harris.*

James Macdonnell (or Macdonald).

JAMES MACDONNELL (or MACDONALD).

Co-prisoners are competent witnesses for one another, by virtue of sect. 1 of 61 & 62 Vict. c. 36 (The Criminal Evidence Act, 1898).

In this case the appellant was convicted on July 6th before Channell J. at Winchester Assizes on two charges of larceny, the one offence being alleged on 25th June and the other on 24th June, and sentenced to twelve months' imprisonment with hard labour (concurrent). In each case the charge was that of stealing old iron from a hospital, and although the iron was different in the two cases they made substantially one transaction. The same jury convicted in both cases.

As to the charge of the 25th, he appealed from an order of the Lord Chief Justice refusing leave to appeal against conviction and, by his leave, against sentence; as to that of the 24th, he appealed against conviction, by leave of the same learned judge.

E. Percival Clarke for appellant (under sect. 10 of the Criminal Appeal Act), who was present. The conviction on the charge relating to 25th June is bad, because appellant was cross-examined in an improper manner. Questions were put to him which suggested that he had been seen on previous occasions taking old iron belonging to the hospital—a fact which had not been proved, since the old iron which formed the subject of the question had not been identified as belonging to the hospital or as stolen. Such a

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question, based on an untrue suggestion—that he was guilty of some other charge—was improper, and calculated to prejudice appellant. On the trial of the first indictment he is asked a question as to the iron the subject of the second indictment.

[The Lord Chief Justice: It was scarcely the suggestion of another charge; appellant denied it.]

The co-prisoner was acquitted.

The conviction on the other charge (24th) was bad, because a prisoner, one of two jointly indicted along with appellant for the same offence, had given evidence on appellant's behalf, and entirely exonerated appellant, but implicated the other, who pleaded guilty. Such a co-prisoner was under a common law disability to give evidence on behalf of his co-prisoner. The Criminal Evidence Act, 1898, had allowed a prisoner to give evidence on his own behalf, but had not removed his disability to give evidence on behalf of his co-prisoner. "Every person charged with an offence . . . shall be a competent witness for the defence at every stage of the proceedings whether the person so charged is charged solely or jointly with any other person" (sect. 1). This means *on his own behalf.* (See Archbold's Criminal Pleading, 393 (23rd edition), and *Sheriff* (1900), 35 L. J. Newspaper 664, *per* Bruce J., there cited.)

[The Lord Chief Justice: It is in the interest of justice that one prisoner may be called for another.]

Further, this conviction was bad, because the old iron seen in the possession of appellant was not identified as stolen property. There was no evidence where the iron came from or went to. Prisoner was undefended.

E. Bligh, for the Crown, stated that the questions in cross-examination were intended not to shew guilt on another charge, but to test appellant's story of having discovered the iron by the riverside, and contended that there was sufficient evidence of identification of the iron. The questions were rightly put. Appellant swore that on June 25th he accidentally found the old iron lying at the side of the road close to the hospital, and did not know where it came from or whether it belonged to anyone. It was, therefore, right to ask him whether he had not been seen at the same place on the previous day taking away similar iron. As

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to the second charge, although no portion of the iron was specifically identified, the evidence was such that the jury might reasonably conclude that he was concerned in the theft.

At the suggestion of the Court—in view of the sentences being concurrent—no further argument was heard on the second conviction.

Darling J.: There is no doubt of appellant's guilt, but as regards the charge relating to the 25th June, the questions objected to were put in an undesirable form. They are put in the form of suggestions or positive statements of fact, and only by the inflection of the voice could it be known that they were questions, whereas such questions, when put to a prisoner in cross-examination, ought to be put in an interrogative form. They should commence: "Did you?" not "You did." We think, however, that no substantial injustice was done by the admission of these questions, and, therefore, we dismiss this appeal.

As regards the second charge, we hold that under sect. 1 of the Criminal Evidence Act, 1898, prisoner is a competent, though not a compellable, witness for a co-prisoner jointly indicted with him for the same offence. The Act does not say that he is to be merely a competent witness "on his own behalf"; it says, on the contrary, "for the defence." See Archbold [as above], citing *Hadwen*, (1902) 1 K. B. 882; 71 L. J. K. B. 581; 20 Cox C. C. 206; 66 J. P. 456; C. C. R. Any other interpretation of the Act would lead to endless confusion and injustice. For instance, a prisoner-witness, in giving evidence on his own behalf, may necessarily have to give evidence on behalf of a co-prisoner. Can it be said that such evidence must be ruled out?

Although the second conviction is bad, yet since the two offences formed practically one transaction, we presume that the sentence passed would have been the same had appellant been only convicted on one indictment. He has been convicted eight times previously, and we see no reason to interfere with it, but it will run from the date of conviction.

First conviction affirmed.
Second conviction quashed.

JOHN GEORGE WINSBOROUGH CHITSON.

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John George Winsborough Chitson.

If the question whether a statement alleged by the prosecution to have been made by defendant was so made becomes material, he may be cross-examined as to the truth of such statement, although, if true, it tends to shew that he has been guilty of misconduct.

This was an appeal, on a point of law, against the conviction, under sect. 5 of the Criminal Law Amendment Act, 1885, of the prisoner for carnal knowledge of a girl under sixteen, before Mr. Justice Channell, on July 8th, at Winchester Assizes. Appellant was sentenced to twelve months' imprisonment in the second division. The prisoner gave evidence on his own behalf. In the course of his cross-examination he was asked if he had told the prosecutrix that he had had similar relations with another girl. He denied that he had said so, and was then asked if the fact underlying the statement so alleged to have been made by him was true. He denied this also, upon which he was cross-examined at length as to his relations with that girl, and certain compromising letters he had sent to her were put to him, and he admitted them.

Counsel at the trial objected to such cross-examination, but the learned judge permitted it.

du Parcq, for the appellant, who was not present, said that the questions so put related to the character of the prisoner, and were therefore inadmissible in cross-examination of the prisoner under sect. 1 (f) (i) of the Criminal Evidence Act, 1898: "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to shew that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless (i) the proof that he has committed or been convicted of such other offence is admissible evidence to shew that he is guilty of the offence wherewith he is then charged."

No cross-examination (not within the exceptions of the section) is admissible to shew a defendant's bad character, even if it has a value for other purpose. Here the questions were admitted because the relations with "the other girl" made it more probable that appellant had made the alleged statement to the prosecutrix. But the Act does not allow cross-examination of this nature merely because it incidentally corroborates a prosecutor's story.

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This cross-examination was not rendered admissible by sect. 1, sub-sect (f) (i), for here, it is submitted, the "proof" of appellant's relations with the "other" girl would not have been admissible. The only admissible "proof" thereof would have been to call her or other witness of his relations with her, and such evidence would have been clearly inadmissible. Sub-sect. (i) was only intended to cover cases where previous offences or convictions may be proved—*e.g.*, to shew "system" or intent.

[Darling J.: The cross-examination was confined to evidence of a particular piece of misconduct, not of a criminal offence, or of general "bad character."]

Such evidence is evidence "tending to shew . . . bad character." "Bad character" here cannot be understood to mean general reputation only, because it is almost impossible to conceive any questions which could be put to a man as to his "general reputation" if particular acts are to be excluded.

St. Gerrans, for the Crown, was not called on.

A. T. Lawrence J.: The evidence was quite sufficient to justify the verdict. The evidence objected to was admissible. There was no way in which prosecutrix could have known about the "other" girl unless she knew it from him. Therefore the question whether in fact those relations had existed became vital to the issue whether prosecutrix was telling a true story. The value of her evidence would be in the ratio of the probability of her ascertaining or of her inventing it. This case is covered by the exception (i), after "unless . . . ." [above]. It was ingeniously argued that the cross-examination was not "proof" that appellant had committed an "offence," but it was *evidence* of such a fact, and it was evidence which was material as shewing that he was guilty of the charge being tried. We do not think this evidence was admissible as shewing "system," or in such circumstances as *Makin* v. *Attorney-General for New South Wales*, (1894) A. C. 57; 63 L. J. P. C. 41; 69 L. T. 778; 17 Cox C. C. 704; 58 J. P. 148, or *Bond*, (1906) 2 K. B. 389; 75 L. J. K. B. 693; 95 L. T. 296; 70 J. P. 424; 21 Cox C. C. 252; 22 T. L. R. 633; 54 W. R. 586; C. C. R., but it was

material as proving the truth of the statement. The prosecutrix swore that appellant had said to her that he had had relations with another servant-girl who had been loving to him. In his cross-examination he denied that he had made any such statement to her, and was then cross-examined as to the truth of the fact contained in the statement. We do not think this was evidence as to the character of the prisoner—which would be inadmissible—but evidence as to the credibility of his story. Credibility is not the same thing as credit. Whatever the value of the evidence may be, its admissibility is in our opinion clear.

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Appeal dismissed.

Solicitors for Appellant—*King & Franckeiss*, Portsmouth.
Solicitors for the Crown—*Biscoe-Smith & Blagg*, Portsmouth.

ELEANOR MARY GAY.

Eleanor Mary Gay.

There must be corroboration of the evidence of accomplices, besides their corroboration of one another's.

If a defendant gives evidence this Court will look at the evidence as a whole and not merely at the case for the Crown.

Application for leave to appeal against conviction.

Appellant was convicted at Salisbury Quarter Sessions on 16th July, 1909, before the Recorder, for receiving nine tins of treacle knowing them to be stolen. She was sentenced to three months' imprisonment in the second division. Five other indictments were not proceeded with.

According to the evidence for the prosecution appellant had received the articles mentioned, besides a quantity of others, from boys who had stolen them from shops. Some articles corresponding to those stolen by the boys had been found by the police in appellant's house, and articles similar to these had been missed by tradesmen.

du Parcq for appellant (under sect. 10 of the Criminal Appeal Act), who was not present. The case against appellant was based upon the evidence of five boys who, upon their own shewing, were accomplices. There was no sufficient corrobora-

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tion of this evidence. The articles found by the police were of an ordinary character, and appellant's possession of them was consistent with innocence. They were not positively identified by the tradesmen called, and some of the articles found in appellant's house and alleged by the boys to have been stolen were not identified at all. There were very grave discrepancies in the evidence of the boys. The case ought to have been withdrawn from the jury on the ground of lack of corroboration. The learned Recorder did not sufficiently impress the need for corroboration upon the jury. The evidence of five accomplices needs corroboration as much as the evidence of one. *Noakes*, 5 C. & P. 326 (1832). The mere fact that stolen goods are found on one's premises is "not sufficient to confirm the evidence of the thief"; per Pollock C.B., *Pratt*, 4 F. & F. 315 (1865); and in *Robinson*, *ibid.* 43 (1864), the same judge peremptorily refused to accept a verdict of guilty of receiving "on the sole evidence of the thief." Further, according to the boys' evidence, appellant's husband was present when the treacle was received and ate some of it. This fact raises a presumption which was never rebutted, that appellant acted under the coercion of her husband.

The Lord Chief Justice: This Court will certainly not hold that the evidence of a number of accomplices needs any less corroboration than that of one accomplice. But here we think that there was corroboration. It may be that at the close of the case for the prosecution there was not enough evidence before the jury to make it safe to convict. But appellant chose to go into the witness-box and to call evidence on her behalf, and this Court must look at the whole body of evidence. The explanations of the defence were unsatisfactory. For instance, appellant could give no explanation of words she admitted having used to a police constable, in which she expressed the hope that one of the boys concerned in the thefts would not get into trouble. The failure of the defence to account for the possession of the property found and for appellant's statements, taken together with the evidence called for the prosecution, amounts to sufficient corroboration, and the application must be refused.

Application dismissed.

WILFRED TOMEY.

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A co-prisoner who has pleaded not guilty may be allowed to plead guilty, and may then be sentenced and called against co-prisoners jointly indicted.

Stuart Garnett for appellant, who was present: In this case appellant, who appealed against conviction on grounds of law, and applied for leave to appeal on grounds of fact, had been jointly indicted and convicted with three others on June 20th, at Portsmouth Quarter Sessions, for thefts of money amounting to 3,000*l.* committed on board H.M.S. "Indomitable." He was sentenced to five years' penal servitude. All four prisoners pleaded not guilty, and were given in charge of the jury. Subsequently, one of them, Hobbs, withdrew his plea and was allowed to plead guilty. Instead of asking the jury, in whose charge he was, to find a formal verdict of guilty, as is the usual practice, the Court accepted the new plea and sentenced him to three months' hard labour. A part of the evidence for the prosecution had already been given, but the Crown was allowed to call Hobbs at this stage as a witness for the prosecution.

The course adopted was irregular. Hobbs could not be found guilty except by the jury into whose charge he had been given. They could not have found him guilty until the close of the trial, when they would have had to find a verdict in all four cases. Had that been done, Hobbs could not have been available as a witness for the Crown. Hence his evidence was inadmissible. There was not merely a technical irregularity, because highly material statements of Hobbs, which were inadmissible against the other defendants, were opened to the jury. The prosecution put forward and relied on previous statements of a Crown witness.

He quoted 3 Coke's Institutes 110, and the Year-book 21 Edw. III. fol. 18, 25; also *Payne and others*, L. R. 1 C. C. R. 349; 41 L. J. M. C. 65; 26 L. T. 41; 20 W. R. 390; 12 Cox C. C. 118 (1872); and *Winsor* v. *R.*, L. R. 1 Q. B. 390; 35 L. J. M. C. 161; 14 L. T. 567; 14 W. R. 695; 10 Cox C. C. 327; 12 Jur. N. S. 561; 7 B. & S. 490; Ex. Ch. (1866), which he admitted was the strongest case against him.

S. H. Emanuel and *R. Asquith*, for the Crown, were not called on.

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The Lord Chief Justice : The point raised is ingenious, but unsound. The case of a prisoner jointly indicted with others can be disposed of before the case against the others is proceeded with. See 1 Chitty's Criminal Law, 428-9, on "express confession." In any case, there has been no miscarriage of justice. The case lasted four days, and I have seldom read so careful, fair and luminous a summing-up. I may add that we have read the further papers sent in by the appellant.

Appeal dismissed.

Solicitors for Appellant : *King & Franckeiss*, Portsmouth.

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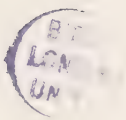

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